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No. 198

IN THE

Supreme Court of the United States

October Term, 1947

THE UNITED STATES OF AMERICA,
Appellant,

v.

SOUTH BUFFALO RAILWAY COMPANY,
BETHLEHEM STEEL COMPANY, and
BETHLEHEM STEEL CORPORATION

Appeal from the District Court of the United States for the Western District of New York

BRIEF AMICUS CURIAE FOR THE AMERICAN SHORT LINE RAILROAD ASSOCIATION

Part II—HISTORY OF COMMODITIES CLAUSE

(Part I is Argument)

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LEGISLATIVE and JUDICIAL

History

OF THE

Commodities Clause

[SECTION 1 (8) OF THE INTERSTATE COMMERCE ACT]

MARCH 15, 1946

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THE END

THE COMMODITIES CLAUSE

The "Commodities Clause"[1] of the Interstate Commerce Act was first enacted by section 1 of the Hepburn Act of 1906[2], and originally read as follows:

> "From and after May 1st, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

It was amended, as it now reads, by section 7 of the Mann-Elkins Act of 1910[3]. It now reads as follows:

> "(8) Transportation of commodity manufactured or produced by railroad forbidden.—From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The only changes in the language were the removal of the comma after the word "whole" and the insertion of

---

[1] Section 1 (8) of the Interstate Commerce Act.
[2] Act of June 29, 1906, 34 Stat. L. 585.
[3] Act of June 18, 1910, 36 Stat. L. 547, effective August 17, 1910.

commas after the words "interest" and "direct". No change was made in the purpose and intent of the statute.

It was made paragraph (8) of section 1 of the Interstate Commerce Act by section 401 of the Transportation Act of 1920.[4]

[4] Act of February 28, 1920, 41 Stat. L. 475.

SHIPPERS' ALLOWANCES CLAUSE

At the time the Commodities Clause was enacted there was also enacted the Shippers' Allowances Clause[1]. As first enacted by section 4 of the Hepburn Act of 1906[2], that clause read as follows:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

It was amended, as it now reads, by section 12 of the Mann-Elkins Act of 1910[3]. It now reads as follows:

> "(13) **Allowance for service or facilities furnished by shipper.**—If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

---

[1] Section 15 (13) of the Interstate Commerce Act.
[2] Act of June 29, 1906, 34 Stat. L. 590.
[3] Act of June 18, 1910, 36 Stat. L. 553, effective August 17, 1910.

The only changes made in the language were the insertion of the words "or on its own initiative" after the word "complaint", and the substitution of the word "services" for the word "service".

It was made paragraph (13) of section 15 of the Interstate Commerce Act, by section 421 of the Transportation Act of 1920[4].

[4] Act of February 28, 1920, 41 Stat. L. 488.

PRESIDENT THEODORE ROOSEVELT'S MESSAGE TO CONGRESS

The first session of the 59th Congress convened on December 4, 1905. The following day President Theodore ROOSEVELT submitted his message to the Congress. His only statement with respect to the railroads was:

> "All private-car lines, industrial roads, refrigerator charges, and the like should be expressly put under the supervision of the Interstate Commerce Commission or some similar body so far as rates, and agreements practically affecting rates, are concerned. The private-car owners and the owners of industrial railroads are entitled to a fair and reasonable compensation on their investment, but neither private cars nor industrial railroads nor spur tracks should be utilized as devices for securing preferential rates. A rebate in icing charges, or in mileage, or in a division of the rate for refrigerating charges is just as pernicious as a rebate in any other way."[1]

[1] 40 Cong. Rec. 92 (1905).

BILLS INTRODUCED IN FIFTY-NINTH CONGRESS RELATING TO REGULATION OF RAILROADS

During the First Session of the Fifty-Ninth Congress many bills[1] relating to the regulation of railroads were introduced:

H. R. 184—By Mr. Russell
H. R. 278—By Mr. Candler
H. R. 296—By Mr. Richardson
H. R. 468—By Mr. Hearst
H. R. 469—By Mr. Hearst
H. R. 4425—By Mr. Townsend
H. R. 5966—By Mr. Adamson
H. R. 6019—By Mr. Sheppard
H. R. 8414—By Mr. Sulzer
H. R. 8437—By Mr. Smith
H. R. 8999—By Mr. Olcott
H. R. 9972—By Mr. Williams
H. R. 10097—By Mr. Hogg
H. R. 10098—By Mr. Hogg
H. R. 10099—By Mr. Hepburn
H. R. 11220—By Mr. McCall
H. R. 12312—By Mr. Davey
H. R. 11488—By Mr. Hepburn

All of these bills were referred to the House Committee on Interstate and Foreign Commerce.

[1] See Volume 40 of Congressional Record—History of Bills Introduced.

COMMITTEE CONSIDERATION OF PROPOSED LEGISLATION

All of the bills received consideration by the House Committee on Interstate and Foreign Commerce. H. R. 11488, introduced by Mr. HEPBURN, was considered at length by the Committee, and was amended in many particulars. The Chairman was requested to reintroduce H. R. 11488, as amended by the Committee.[2]

THE HEPBURN BILL INTRODUCED

On January 2nd, 1906, Chairman HEPBURN of the House Committe on Interstate Commerce, introduced H. R. 12987, 59th Cong., 1st Sess., which was H. R. 11488 as amended by his Committee.

So far as is pertinent to this study, that bill contained the following provisions:

> "The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all frieght depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and

[2] House Report No. 591, 59th Cong., 1st Sess. (1906).

it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * *

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnished any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."[3]

[3] This provision was the inception of section 15 (13) of the Interstate Commerce Act.

ANTECEDENTS OF COMMODITIES CLAUSE PROPOSAL

The third session of the 58th Congress convened on December 5, 1904[1] and adjourned on March 4, 1905[2]. On December 16, 1904, the Senate Committee on Interstate Commerce began hearings on bills to amend the Interstate Commerce Act. These hearings had not been concluded when the Congress adjourned. On March 2, 1905, the Senate adopted Senate Resolution 288, Fifty-eighth Congress, Third Session,[3] reading as follows:

> "*Resolved*, That the Committee on Interstate Com- or any subcommittee thereof, is instructed to sit during the recess of the Senate, at such times and places as may suit the convenience of said committee or subcommittee, to consider the question of additional legislation to regulate interstate commerce and to authorize the Interstate Commerce Commission to fix rates of freight and fares, and to acquire further information as to interstate commerce, including violations or evasions of the antirebate law and the devices and methods by which such evasions are accomplished, and including refrigerator and other private car systems, industrial railway tracks, switching charges, and the like, and also to consider what legislation should be enacted in relation to the liability of railroad companies engaged in interstate traffic, or operating lines in any territory of the United States, for injuries received by their employees when in the discharge of duty; said committee or subcommittee is authorized to employ experts, administer oaths, take testimony, send for persons and papers, employ a stenographer to report its hearings and to have them printed, which hearings shall be sent, as soon as printed to each member of the Senate. Said committee shall make a full report of its proceedings hereunder by bill or otherwise within ten days after the meeting of the next Congress.

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[1] 39 Cong. Rec. 1 (1904).
[2] 39 Cong. Rec. 4041 (1905).
[3] 39 Cong. Rec. 3857 (1905).

> All necessary expenses to carry out of the provisions of this resolution shall be paid from the contingent fund of the Senate."

Pursuant to this resolution, the Senate Committee on Interstate Commerce began further hearings on April 17, 1905 and continued to hold such hearings until May 23, 1905, taking 3795 printed pages of testimony and arguments.[4]

During the course of these hearings, members of the Interstate Commerce Commission testified at length.[5] Commissioner CLEMENTS said[6]:

> The Commission has never recommended or asked for anything more than the President recommends or suggests.

Commissioner CLEMENTS also said[7]:

> "The Commission has, since its existence, annually made reports to Congress, as the law premptorily requires it to do, respecting the work of the year, respecting defects in the law, and making such recommendations and suggestions as may be deemed necessary for the amendment of the law."

The Commission had made no recommendations to Congress for legislation forbiding carriers to engage in other

---

[4] These Hearings are captioned "Regulation of Railway Rates".—Hearings before the Committee on Interstate Commerce of the United States Senate, in Special Session, Pursuant to Senate Resolution 288, 58th Cong., 3d Sess. (1904-1905). Six volumes with index. Volumes 1 to 4 (pp. 3559) contain the Report of the Hearings. Volume 5 (pp. 1154) contains the Appendices. Volume 6 (pp. 811) contains the Digest of the Hearings. Senate Library Volumes 97-101. These Hearings are herein referred to as "Hepburn Act Hearings".

[5] Commissioner Clements, May 19-20, 1905, pp. 2988-3057, 3220-3253; Commissioner Cockrell, May 22, 1905, pp. 3371-3382; Commissioner Fifer, May 22, 1905, pp. 3325-3368; Commissioner Knapp, May 20, 1905, pp. 3292-3308; Commissioner Prouty, May 18, 1905, pp. 2861-2913.

[6] Hepburn Act Hearings, p. 3004 (1905). For the President's recommendations see, *supra*, p. 5.

[7] Hepburn Act Hearings, p. 2988 (1905).

than their transportation activities and functions.[8] None of the Commissioners made such a suggestion in their respective appearances before the Committee. Senator DOLLIVER said to Commissioner PROUTY:

> "But do you think it is proper for railroads to be interested in manufacturing or mining as against their competitors on their lines?"

To this inquiry, Commissioner PROUTY[9] made this reply:

> "That is an economic proposition. No; I do not much think that it is; but there are a good many cases, not only in the case of the anthracite-coal roads in Pennsylvania, but it is the case with the bituminous roads out West and in a great many places."

This is the only comment on the subject by any Commissioner. Commissioner PROUTY referred only to coal-carrying railroads. The Commission had early recognized that such railroads possessed "the commingled attributes of carrier and producer".[10] Even after the Commission had made a comprehensive investigation of the coal-carrying railroads, pursuant to direction of Congress,[11] it went no further than to recommend[12]:

> "1. That every railroad publish its system of car distribution, as well as car allotments from time to time.
>
> 2. That a just estimate be made of capacity, where it is used as a basis, by an independent party in the presence of representatives of the mine in question.

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[8] 1-19 Annual Reports of Interstate Commerce Commission, 1887-1905. The only legislation on the subject that had been introduced in Congress up to that time was H.R. 12654, 49th Cong., 2d Sess., "to prevent the combination of carrying interstate commerce with other business." No action on this bill was taken.

[9] Hepburn Act Hearings, p. 2883 (1905).

[10] Haddock v. Delaware, L. & W. R. Co. 3 I.C.R. 302 (1890); Coxe Brothers & Co. v. Lehigh Valley R.R. Co. 3 I.C.R. 460 (1891).

[11] House Resolution 4, 59th Cong., 1st Sess. (1906); H.J. Res. 32, 59th Cong., 1st Sess., (1906).

[12] House Document 561, 59th Cong., 2d Sess. (1907) Preliminary reports had been submitted.

3. That individual cars be absolutely eliminated, and all others be distributed according to clearly defined rules.

4. That carriers or officers or employees be positively forbidden to have any interest whatsoever in any coal properties except such as are maintained solely for the purpose of supplying the railroad in question with fuel."

During the course of its hearings, the Senate Committee on Interstate Commerce requested the Commission to submit, in writing, its recommendations for changes in the law. The Commission complied, and on November 28, 1905, it sent the following letter to Chairman ELKINS of the Senate Committee[13]:

"As requested by your Committee, the Interstate Commerce Commission has the honor to submit herewith, in the form of a Bill, its recommendation for amendments and additions to the existing laws for the regulation of interstate carriers.

"The Act to regulate commerce was passed in February, 1887, and has been in force since that time. Its provisions have become familiar to the various interests affected by its administration and several of its sections have been judicially construed. For this and other reasons it is believed that needful changes in the law should take the form of specific amendments to that statute rather than the enactment of an independent measure. We are of the opinion that this course would simplify legislation and be more likely to avoid uncertainty of meaning. There appears to be no occasion to alter the general plan of the original Act, and it would seem advisable to increase the effectiveness by amending particular sections.

"With this preliminary observation we proceed to explain the changes proposed, taking up the various sections in numerical order.

"It will be seen that the amendments submitted to the first section are designed (a) to somewhat enlarge

[13] I.C.C. General Letter Book, Volume 55 p. 52 (1905).

the jurisdiction of the law as to the carriers subject to its provisions, and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation or respecting which there is dispute as to the authority of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase "under a common control, management, or arrangement," in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the Act. The second purpose is sought to be accomplished by enlarging the definition of the term "transportation" so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide the services here referred to is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the Act, which are commonly spoken of as containing its principles or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction.

* * * *

"The measure as drafted includes all the amendments to the Act to Regulate Commerce which the Commission deems necessary to now recommend. Some further legislation may be proposed in our next annual report to the Congress, relating to matters not distinctly within the scope or purpose of the regulating statute but such legislation would more properly amend other existing laws or take the form of independent enactments.

All of which is respectfully submitted."

A bill, containing the recommendations of the Commission, accompanied this letter.[14] So far as is pertinent to this subject, the bill contained the following provisions:

* * * *

[14] The bill is printed in full as an Appendix to the Commission's 19th Annual Report, at pp. 177-183 (1905).

"The term railroad, as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term transportation shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor.

"All charges made for any service rendered or to be rendered in the transportation of passenger or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the Commission may, after full hearing of a complaint, determine what is a reasonable charge to be paid by the carrier for the service so rendered or the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

Following the transmission of this letter, and the bill which accompanied it, the Commission submitted its Annual Report to the Congress, under date of December 14, 1905. In that report the Commission said[15]:

[15] 19 Annual Report of I.C.C. pp. 5-6, 10-11 (1905).

"The Interstate Commerce Commission has the honor to submit its nineteenth annual report for the consideration of the Congress.

"In previous reports the Commission has repeatedly called attention to the necessity for certain amendments and additions to the present act to regulate commerce.

* * * * *

"After the adjournment of the last Congress and during the spring and early summer of this year the Senate Committee on Interstate Commerce conducted an extended inquiry, which appears to have developed every important argument bearing upon the question. Toward the close of this inquiry opportunity was afforded to the members of the Commission to express their views, and they were heard at considerable length. The Commission was thereupon asked to submit its recommendations in writing to the committee, and has lately complied with that request. The recommendations so made were presented in the form of a bill, which, with the letter of explanation transmitting the same, is printed as an appendix to this report.

"The form of the proposed measure, as will appear upon inspection, is an amendment of certain sections of the present statute. This statute was passed in February, 1887, and has been in force since that time. Its provisions have become familiar to the various interests affected by its administration, and several of its sections have been judicially construed. For this and other reasons it is believed that needful changes in the law should be made by specific amendments rather than by the enactment of an independent measure. We are of the opinion that this course would simplify legislation and be more likely to avoid uncertainty of meaning. There appears to be little occasion to alter the general plan and framework of the original act, and it would seem advisable to increase its effectiveness by amending particular sections.

"Aside from the main question—the grant of power to the Commission, after hearing, to fix the future

rate—several other amendments are proposed with the view of improving the law as a remedial measure, and these amendments will now be referred to under appropriate headings.

Enlargement of Jurisdiction

"It will be seen that the changes proposed in the first section are designed (a) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation or respecting which there is dispute as to the power of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase "under a common control, management, or arrangement," in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the act. The second purpose is sought to be accomplished by enlarging the definition of the term "transportation," so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide the services here referred to is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the act, which are commonly spoken of as containing its principal or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction.

TERMINAL ROADS, ELEVATOR CHARGES, and PRIVATE CARS.

"There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper

is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper; the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another.

"It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown upon under the present system. Moreover, there are many instances in which the service can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public if provided by the shiper himself.

"We do think, however, that the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which should not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

This was the situation at the time the Hepburn Bill was introduced in the Congress, on January 24, 1906.

THE HEPBURN BILL REPORTED

H. R. 12987 (frequently referred to as the Hepburn Bill) was reported to the House by the Committee on Interstate and Foreign Commerce on January 27, 1906, without amendment, and with a recommendation for its passage. The action of the Committee had been unanimous, each of the 18 members being present when the action was taken, and all concurring therein[1].

From the Report of the Committee the following is excerpted:

> "The subject of enlarging the powers of the Interstate Commerce Commission is one that has received the attention of this committee for several years. During that period nearly all of the interests involved in such a change in legislation as is proposed has been heard through the representatives of those interests before the committee. The subject has also received the attention of the Committee on Interstate Commerce of the Senate, and five volumes of "Hearings" have been published that were accessible to your committee.
>
> "While House bill 12987 is reported without amendment, it is proper to explain that H. R. 11488 was considered at length by the committee, and was amended in many particulars, and after being so amended the chairman was requested to introduce H. R. 12987 for the purpose of convenience, and it is now presented as the action of the committee. In the preparation of this bill the committee has been aided by their study of all the bills and probably have borrowed something from each one. It will be noticed that many of the features of the Esch-Townsend bill, reported at the last session of the Fifty-eighth Congress with the recommendation of a large majority of the committee, are preserved in this bill.
>
> "For some time the shippers of merchandise throughout the country have very generally been demanding, through the press, through conventions, and through petition, an enlargement of the powers of the

[1] House Report No. 591, 59th Cong. 1st Sess. (1906).

Interstate Commerce Commission, so that certain abuses frequently perpetrated by common carriers by rail could be prevented. It has been believed by a large portion of the shippers that railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimination were indulged in by various methods by the carriers. This bill seeks to remedy those evils by amendments to existing laws. The interstate-commerce law has been in force nearly twenty years. During that time the Interstate Commerce Commission and the courts have given construction to many of its provisions. Therefore it was not deemed wise to attempt an entire new enactment, but, on the contrary, to preserve all of the law that could be preserved and only amend it in the direction of giving more power and making more plain some of its provisions.

* * * * *

"The first section of the bill is substantially section 1 of the act of 1887, with an enlargement of the definition of the word "railroad" and the word "transportation." By this enlargement it is believed that the "devices" resorted to by carriers, through the use of switches and cars owned by shippers, and by the use of frigerator cars, and so forth, can be obviated.

* * * * *

"* * * This section further provides that if the owner of property transported, directly or indirectly, renders any service in connection with or furnishes any instrumentality, the charges for these shall be no more than is just and reasonable, and also gives to the Commission power upon complaint to determine what is a reasonable charge, as the maximum, to be paid by the carrier or carriers for the service or the use of the instrumentality. It is believed that under this provision those excessive charges, constituting rebates that are in some instances paid to shippers who own their own cars, may be controlled. The Commission may also establish through routes and determine upon the division of rates, when such division can not be agreed upon by the carriers, but this power is limited to cases when no reasonable or satisfactory through route exists."

THE HEPBURN BILL CONSIDERED IN HOUSE OF REPRESENTATIVES

On January 30, 1906, MR. HEPBURN moved that the House resolve itself in Committee of the Whole House on the State of the Union to consider the bill H. R. 12987, asking unanimous consent that debate be confined to the subject matter, and that all gentlemen speaking on it, have five legislative days after the conclusion of the debate in which to extend their remarks on the bill in the Record.[1]

MR. TOWNSEND opened the debate on the bill, in the course of which he said:[2]

> "Mr. Chairman, for the second time the Interstate Commerce Committee of the House of Representatives presents a bill to the Congress and the country intended to amend the present interstate-commerce law, in response to a demand from the people for a larger and more satisfactory regulation of interstate carriers by the Government.
>
> * * * * *
>
> "* * * It may not remedy every defect in existing laws to which every complainant has called the Commission's attention, but it is believed that it will be sufficient to cure every defect against which any considerable objection is made.
>
> * * * * *
>
> "The bill attempts to place under the supervision of the Commission every form of interstate and foreign commerce, all instrumentalities of commerce and transportation. The measure which passed the House last session was believed to cover all the facilities of transportation, but inasmuch as some gentlemen contended that it did not, we have endeavored in the present bill to use such language as will take the matter out of the realm of doubt. To that end we have

[1] 40 Cong. Rec. 1763 (1906). The debate on the bill will be found in 40 Cong. Rec. 1763, 1828, 1832, 1892, 1893, 1897, 1953, 1965, 1977, 1993, 2032, 2070, 2079, 2080, 2102, 2150, 2165, 2221 and 2270 (1906).

[2] 40 Cong. Rec. 1763-1765 (1906).

declared that cars, vehicles, and instrumentalities of shipment or carriage, irrespective of ownership or of any contract, express or implied, and all services in connection with traffic, such as elevation, ventilation, refrigeration, or icing shall be considered as being furnished by the carrier, and therefore under the supervision of the Interstate Commerce Commission. We have also stipulated that terminal, icing, and other similar charges shall be published as separate items, so that the shipper may understand just what he is paying for each particular service, and then we have said that all such charges shall be just and reasonable, that any other is unlawful.

* * * * * *

"The same argument applies to elevator and terminal charges. We believe it will no longer be possible for a great manufacturing corporation to build a spur or siding up to its factory and then use it as a basis for obtaining rebates prejudicial to its competitor."

MR. TOWNSEND thus indicated that one of the principal objectives of the bill was to prevent indirect rebates by means of excessive payments by railroads to private car lines, industrial railroads and the like for service often minor in character, as to which there had been much complaint during the hearings on the subject.

MR. HINSHAW, in the course of his statement, said:[3]

"However, I think it is incumbent upon me briefly to set forth what I regard as the salient features of this legislation, because, perhaps, in a peculiar way, it affects the great trans-Missouri country in which for eighteen years I have had the pleasure to live.

"This bill is voluminous and complete, and is an honest effort to reach and correct the various abuses and discriminations which exist in railroad traffic. It provides:

* * * * *

"7. If the owner of the freight renders any service or furnishes any instrumentality used in transpor-

[3] 40 Cong. Rec. 1778-1779 (1906).

tation, the charge therefor shall be just and reasonable, and the Commission may, on a hearing had, fix and enforce for such service a reasonable rate. This provision controls the charges for terminal facilities, icing of cars, and private cars furnished by the shipper.

* * * * *

"Another great difficulty which was sought to be remedied by the Elkins anti-rebate bill and which has been evaded in many instances by charges for terminal facilities, charges for small switches, or for 4 or 5 miles of track owned by the shipper, and by the payment to him of a relatively exorbitant higher rate for a terminal facility or other instrumentality, he gets in effect, a rebate upon his entire shipment. This bill, in my judgment, meets that difficulty, and says that these terminal facilities, these switches, as well as private cars and icing of private cars and refrigerator cars, shall be just and reasonable, and that the Commission is invested with power to see that a reasonable and just charge only is made for these different facilities, taking, no doubt, into consideration the general freight rates along the whole line over which the shipment is to be made."

Then followed a colloquy between MR. TOWNSEND and MR. RICHARDSON of Alabama[4]:

"MR. TOWNSEND. Does not the gentleman from Alabama believe that the provision against midnight tariffs, the provision against private cars, against terminal tracks, is a provision to stop the most iniquitous forms of rebate that are known.

"MR. RICHARDSON of Alabama. I think we have several provisions in this bill that will prove most efficient in suppressing rebates. I am coming to that in my remarks."

The provision in the bill, which became section 15 (13) of the Interstate Commerce Act, did not, in the opinion of some members of the House, go far enough to remedy

[4] 40 Cong. Rec. 1781 (1906).

the admitted evil of indirect rebating. MR. CAMPBELL offered an amendment to require trunk-line railroads to own all special types of cars used in transportation and to forbid them to lease or use cars owned by private interests, but the amendment was rejected.[5] However, in the interest of clarity the text of the proposed amendment is given:

> "*Provided,* That all ventilator cars, refrigerator cars, oil or tank cars, including express company and express cars, and any and all cars which have heretofore been termed 'private cars,' used in the transportation of any article or commodity of interstate of foreign commerce, are hereby declared to be and are common carriers and subject to all laws, rules, and regulations regulating or affecting common carriers in the transportation of articles or commodities of interstate and foreign commerce.
>
> "*Provided further,* That from and after the passage of this act it shall be unlawful for any railroad company engaged in the business of a common carrier to contract with any person, firm, or corporation, being the producers or shippers of any article or commodity entering into interstate or foreign commerce, for the shipment or transportation of such article or commodity when such article or commodity is offered for shipment or transportation in ventilator cars, refrigerator cars, tank cars, or private cars of any character whatsoever, owned or controlled, directly or indirectly, by such producers or shippers. To be a stockholder in, or director or officer of, any company owning or controlling such ventilator cars, refrigerator cars, tank cars, or private cars of whatever character shall be considered as having such an interest as is prohibited by this act."

MR. KNAPP, on February 1, 1906, supported MR. CAMPBELL'S amendment, criticising the payment of rebates, and saying[6]:

> "* * * Akin to this is the so-called 'private car system' a system by which private or corporate car com-

[5] 40 Cong. Rec. 1828 (1906).
[6] 40 Cong. Rec. 1893-1894 (1906).

panies owning their own cars obtain discriminating rates of transportation, and also the private terminal system, under which companies or corporation utilize branch or yard tracks for the purpose of organizing railway companies, and thereby obtain from the railroads a discrimination in rates for transporting the output of their industries.

"These illustrations suffice to show how and to what extent discriminations have been practiced, not all of which, however, it is just to say, have been invited by the railways. Laws have been enacted the intent and purpose of which were to eliminate these evils and to prevent the entire rebate system."

MR. FRENCH reviewed the evils which the bill sought to correct, and, in doing so, said[1]:

"Mr. Chairman, in my judgment the measure which we are now considering is the most important matter that has presented itself to this Congress.

* * * *

"The Elkins Act was passed three years ago and has afforded some relief. It is aimed mainly at the system of rebates and discriminations and is not sufficient there. The provisions of the law have been skillfully avoided, and clever devices have been resorted to to thwart the working of the law and the law which it amends. We could mention the 'midnight schedule,' where a favored shipper would be notified in advance of a certain rate on a certain day. The favored shipper would take advantage of the schedule, and before other shippers could do likewise the old rate would be established. We could mention icing and terminal charges, unreasonable charges for private cars, unreasonable division of the freight charges with a favored shipper who might own a mile or two of track, unreasonable elevator charges, and a host of other devices for increasing rates to one shipper while making the favored shipper in his line supreme.

* * * *

[1] 40 Cong. Rec. 1908-1911 (1906).

"First. The bill, by definition, gives broader meaning to the word "railroad" than does the present law, and declares that word to include all switches, spurs, tracks, and terminal facilities of every kind, also all freight depots, yards, and grounds used or necessary in the transportation or delivery of persons or property. It gives broader meaning to the term "transportation" and makes that term include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

* * * *

* * * It is also provided that should the owner of property transported under this act render any service connected with transportation or furnish any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable maximum charge to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished and fix the same by appropriate order.

* * * * *

"This, Mr. Chairman, covers the general scope of the pending bill, and, in my judgment, this measure strikes at the heart of existing evils. The sections of the bill giving broader meaning to the terms "railroad" and "transportation," so that they shall include, as I have pointed out, terminal facilities, and the necessary means of accommodation in transit will very largely do away with the possibility of secret rebates of all kinds."

On the following day, February 2, 1906, MR. THOMAS of North Carolina made this statement respecting the purpose of the bill[5]:

"Mr. Chairman, this bill is entitled "An act to

[5] 40 Cong. Rec. 1954 (1906).

amend 'an act to regulate commerce.'" approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission. The title indicates the purpose and intent of this measure.

* * * *

"Section 1 is subtantially section 1 of the act of 1887, with an enlargement of the definition of the word "railroad" and the word "transportation." By this enlargement it is believed that the "devices" resorted to by carriers, through the use of switches, terminal tracks, and private cars, and so forth, can be obviated."

MR. GOULDEN followed, supporting MR. CAMPBELL'S amendment, arguing that the bill did not go far enough. He referred to prior legislative attempts to prevent rebating, and the failure of the law to accomplish that purpose. With respect to the pending bill, he thought there should be greater control over the facilities relating to transportation. MR. GOULDEN said[9]:

"Mr. Chairman, I have listened with a great deal of pleasure and satisfaction to the debate upon this important measure.

"The bill (No. 12987) under consideration is in the main the more satisfactory railroad-rate bill than ever hitherto offered to Congress.

* * * *

"The bill that passed last Congress, and against which I had the honor of casting my vote, was exceedingly objectionable. The provision creating a special court with its heavy expenses, the failure to reach the private-car and terminal-charge evils, caused the Senate to refuse last year to consider the action of this body. The thousands of private cars of the meat, fruit, and other trusts dictated terms to the railroads and compelled compliance with their demands.

"The same is equally true of the terminals. With the indulgence of the Members of the House, allow

[9] 40 Cong. Rec. 1959-1961 (1906).

me to give a few of the many cases familiar to the country:

"The Union Railroad Company, of Pittsburg, Pa., less than 10 miles in length, and connecting the great plants of the steel trust at Homestead, Braddock, and Duquesne, secures an average of one-third of the freight charges on all freight entering or leaving from all points in the United States.

"The Monongahela and Southern Railroad Company, of Pennsylvania, 1 mile in length, connecting the works of Jones & Laughlin, of the South Side, Pittsburg, with the Baltimore and Ohio, the Pennsylvania lines, and the Lake Erie roads, secures one-fourth or more of the freight charges to all points in the country, exacted as tribute from the railroads mentioned.

"The gentleman from Missouri [MR. WOOD], in a forceful speech on the floor of the House recently, gave many startling facts of the outrageous and exorbitant charges of the St. Louis Terminal Railroad. He showed that the terminal charged five times as much for a 2-mile haul as the railroads did for a 50-mile run. The same conditions exist in every large city in this country. I doubt if the bill now under consideration will effectually remedy this glaring evil, to which the railroads are subject and for which the ordinary people must pay the freight. [Applause.]

"The meat in the Hepburn bill now under consideration is contained in the report of the committee and in the new section, to be known as section 24."

In the light of this discussion, the failure if the CAMPBELL amendment exhibits the will of the House to not forbid shippers the right to own facilities or provide services, but to leave them to regulation by the Interstate Commerce Commission, under what is now section 15 (13) of the Interstate Commerce Act.

MR. BURTON, while speaking on the Hepburn bill, threw light on what is now section 15 (13) of the Interstate

Commerce Act, the situation which called it forth, and to which it was intended to apply. MR. BURTON said[10]:

> "Human ingenuity has probably never been exercised with more acuteness than in avoiding the law in regard to rebates. Terminal charges, the use of elevators and of warehouses, switches, and branch lines owned by shippers have all been utilized in such a manner as to continue the most odious forms of discrimination. In addition to these there are the refrigerator cars and other kinds of private cars, all of which make it possible to give advantages to the favored shipper. It is a well-known fact that in past years persons engaged in trade have found that their business was conducted as a loss except for the rebates which they received, which were of so large an amount as not only to make up for the loss, but to afford a profit. Every device has been resorted to which was possible to conceal the unequal treatment of different shippers. Fictitious damage claims against the railway have been resorted to as a means for the payment of rebates. So far as legislation can correct these evils this bill corrects them. It strikes a blow at the abuses of the private car system, switches, branch lines, and terminal facilities. It provides that if the shipper renders any service in transportation the allowance for such service shall be no more than is just and reasonable, and gives the Commission power to prevent the partnership between railways and those who have received favors in this specious form."

MR. BURKE of South Dakota, speaking for the bill and of its purposes, said[11]:

> "Mr. Chairman, in 1887, responding to a demand from the people asking for remedial legislation against abuses on the part of the railroads of this country, Congress passed and enacted the present interstate commerce law, which was approved by the Executive on February 4, 1887. No one questions the fact that that was a step in the right direction and that it is a law that has given relief to the people of the country

[10] 40 Cong. Rec. 1963 (1906).
[11] 40 Cong. Rec. 1966-1968 (1906).

and at the same time been an advantage and a protection to the railroads.

• • • • •

"Before discussing some provisions of the bill now before the House I want to submit what it proposes to do:

• • • • •

"If the owner of property transported directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may determine what is a reasonable charge as the maximum to be charged by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished.

• • • • •

"This bill, Mr. Chairman, is substantially in form as suggested by the Interstate Commerce Commission. Instead of making a new law it proposes to amend the present interstate-Commerce act.

• • • • •

"• • • Mr. Chairman, the report of the Commission, all of the evidence upon this subject of rebates, shows that rebates are being indulged in quite generally throughout the country without any violation of the Elkins Act whatever by means of practices or instrumentalities, such as refrigerator cars, icing charges, elevator charges, terminal and side-track facilities, that rebates are given that are in fact rebates just as if the Elkins law had never been enacted. This bill makes it impossible for those practices to be continued if it should become a law."

MR. McCALL said[12]:

"Mr. Chairman, if the pending bill made an effective response to public opinion upon the railroad question, it would deal in the most comprehensive and the most particular terms with rebates or favored rates, wheth-

[12] 40 Cong. Rec. 1969 (1906).

er given directly or in any of the indirect forms in which they have been extended.

* * * *

"* * * The private car, refrigerator car, the industrial switch, receiving a part of the through rate as if it were an independent line, every instrument of favoritism and injustice, had justly received public condemnation."

MR. CLAYTON, the author of the Clayton Act, on February 3, 1906, supported the bill, saying[13]:

"Now, Mr. Chairman, I should like to dwell upon all the features of the pending bill, for I believe that every feature embraced in this bill is a good feature and should be enacted into law. I believe that every provision of this bill, every word and line of it, makes for the good of the great common people of our common country. [Applause.] They, and not the multimillionaires made such by their unlawful regulations and extortionate and sometimes criminal practices, are deserving of our best consideration. But time will not permit me to refer to all the features of the bill. I would support it did it embrace only putting the single provision of private cars, the icing cars, terminal and switch facilities under the jurisdiction of the railroad commission."

MR. ESCH, a prominent member of the Committee, later its Chairman, and for many years a member of the Interstate Commerce Commission, speaking for the bill, said[14]:

"Now, with reference to the bill here presented, I wish to call attention to the phenomenal fact that it has the almost unanimous indorsement of the Members of both sides of the Chamber and the unanimous indorsement of members of both parties on the committee. A unanimous report ought to insure the passage of any bill. Unanimity in committee was not secured by the sacrifice of principle by any member of it.

* * * *

[13] 40 Cong. Rec. 1996 (1906).
[14] 40 Cong. Rec. 2002-2005 (1906).

"The ills from which the shipping and general public have suffered, as a result of unjust charges and discriminations connected with industrial and terminal lines, switching, icing, elevation, and refrigeration were less heard of and less complained about prior to the enactment of the Elkins law than since. As these ills arose out of instrumentalities of shipment or carriage and were not due to the carriers themselves, immunity from prosecution under the Elkins Act was claimed. It is to prevent any further claim from such immunity that this bill makes the common carriers themselves solely responsible for all such instrumentalities and facilities of shipment or carriage, so that they, irrespective of any contracts or agreements they may have, may be held responsible.

* * * *

"The passage of this bill will place the charges for terminal tracks and switching and industrial lines within the jurisdiction of the Commission. When a great industrial corporation, doing a vast annual freight business, owns and controls a spur track a fraction of a mile in length connecting with trunk lines, it can, under the guise of a joint tariff, secure in return for routing its freight over a given line a certain amount per car as payment for use of its spur track. This charge is out of all proportion to what the spur track bears to the through route, but carriers pay the same in order to secure the business. This undue share of the through route is nothing but a species of rebate to the industrial company, and gives it by so much an advantage over all other companies engaged in the same locality in the same line of business."

No further discussion of the bill of pertinency here was had until February 5, 1906, when MR. STEVENS of Minnesota endorsed the bill, saying[15]:

"That is in previous existing legislation. The old interstate-commerce law and the Elkins law covered rebates thoroughly, and this gives additional power to prevent extortions.

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[15] 40 Cong. Rec. 2088 (1906).

"Of course, the language of the bill extending the scope of the Commission in the way of including private cars, refrigeration, switches, elevators, and terminals, which are only a convenient way of rebate, are covered in the bill, and in that way the question of rebates is well covered."

On the same day MR. DAVIDSON said[16]:

"Mr. Chairman, the country is to be congratulated upon the unanimity with which the bill now under consideration, touching the matter of railway rate legislation, has been reported to this House by the able committee having jurisdiction of the subject and the vote by which this House will approve of the work done by that committee. The subject is one of absorbing interest to the people of the country.

* * * * *

"In various parts of the country there now exist auxiliary companies known as 'private car lines,' 'terminal lines,' 'refrigerator lines,' and others, all created largely for the purpose of demanding a portion of the transportation charge in return for some slight service rendered, and which, in fact, is only another form of giving rebate to those specially favored.

"One of the important features of this proposed legislation is that which defines the word 'railroad' and the word 'transportation' in a manner to include all these auxiliary companies and all the instrumentalities of a common carrier."

On the following day, February 6, 1906, MR. BOWERS, speaking for the bill, said[17]:

"Mr. Chairman, the pending measure is beyond question the most important that will be considered by the Fifty-ninth Congress.

* * * * *

"Terminals and switch tracks are also convenient devices under which to conceal rebates, and they, too,

[16] 40 Cong. Rec. 2102-2103 (1906).

are, and should be, made the subject of legislation and regulation.

"I turn now to the present bill and will try to point out where it remedies the evils existing under the present law, as I see and conceive them.

"Section 1 amends the corresponding section of the existing interstate-commerce act so as to include within the term 'railroad,' as used in the act, and subject to the supervision of the Commission and to all the provisions of law, "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property," and "all freight depots, yards, and grounds used or necessary, etc.," and all "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

"To my mind this effectually includes the private car lines, switch tracks, and terminals, affords a fair guaranty for their supervision and proper regulation, and, in a great measure, if not entirely, provides for existing evils so far as they are concerned. It strikes a blow at rebating in that it puts their charges under the supervision of the Commission, provides for publicity, and gives that body an opportunity to correct any inequalities and improper practices.

* * * *

"The Commission is authorized to create through lines of carriage and through routes upon complaint and after hearing wherever, in their discretion, they

[11] 40 Cong. Rec. 2157-2160 (1906).

are necessary. This section specifically provides that if an owner of any property transported shall himself perform any service toward its transportation or carriage the charge therefor shall be no more than a fair compensation for the service or a fair proportion of the whole rate."

MR. WALDO followed, saying[18]:

"Mr. Chairman, in the first place, I believe, there is no one in this House and no one in the country who desires to do any injury to the railroads. We all know and believe that the prosperity of the whole country depends almost entirely upon our transportation system. There is no one who would take away any right from any road or in any way oppress any railroad corporation. In fact, I have never known of any attempt that was successful in this country to oppress any railroad corporation, and it is very doubtfull if there ever will be.

"Under the law, as it now exists, the Interstate Commerce Commission has every power, except one, granted by this bill, and that is to fix maximum rates. The only addition is to extend the control of the Commission to terminal facilities, private car lines, and private switch facilities, so that there shall be no special charges on these accounts that will make rates that are unjust or unreasonable or reductions that shall give undue preference to any particular person or favored shipper.

• • • •

"It is urged that there is no occasion for the grant of any such power, and I understood the gentleman from Ohio [MR. GROSVENOR] to state that there was no occasion and no demand from the country for the grant of any such power. In the first place, before the Interstate Commerce Commission during the last year there were filed 568 complaints. These include 65 formal cases and investigations, and these involve directly the rates and practices of 321 railroads and common carriers in all parts of the country. After hear-

[18] 40 Cong. Rec. 2178-2179 (1906).

ing these cases, the Commission were authorized only to find that the rates or practices were unjust, and that was their finding in most of these cases, but they had no power to state what was just or reasonable. And there was no one that had any power to state it except the corporation that made the unjust charge.

"Many cases of unjust rates charged by railroads, known to the people of all sections of the country and still persisted in, have never been before the Commission. There is one practice of the Pennsylvania Railroad that obtains every year which is clearly an outrage upon the rights of the people. The coal railroads start every April with a fixed price for coal delivered at tidewater, and with the announcement that the rate will be increased 10 cents per month for five months, until the time when the poor must have coal, and then they have to buy coal at the highest rate during all the rest of the year until the next April. There is no justification for any such practice as that. The coal railroads of Pennsylvania have fixed the freight for carriage of coal to the seaboard at such a rate that the coal has been advanced from a dollar to one dollar and a half in price ever since they made their combination and forced the independent operators to come in with them, and it has remained at that ever since. Before they made their combination and forced the independent operators to sell all their output to the combination, the price of coal delivered to the Atlantic seaboard was only $4 a ton.. Today it runs from $5 to $5.50 a ton, and has been so continuously ever since that combination of the roads in Pennsylvania.

"These railroads own today 90 per cent of all the coal mines in Pennsylvania, and have control substantially of all the coal that is used in the great cities of the East, New York, Philadelphia, Baltimore, and, to a considerable extent, of this city. In this city coal is today a dollar a ton higher than it ought to be, on account of the unlawful combination and unreasonable freight charges of these roads."

MR. CANDLER said[19]:

[19] 40 Cong. Rec. 2180-2181 (1906).

"Mr. Chairman, I would not undertake at this stage of the consideration of this measure to go into any extended discussion of the legal question involved, or to the expediency of the policy which is presented by the bill now pending before the House.

• • • • •

"Now, with the definition clear and distinct as to what carriers are included in the provisions of this act and what shall be meant by the term 'railroad' and by the term 'transportation,' and that all the rates shall be reasonable, in my judgment, the provisions of this act can not be construed away, and that is important, because the courts have held that the Interstate Commerce Commission can only exercise the powers specifically conferred in the act and that nothing shall be done by implication. Hence, the importance of these provisions."

MR. MANN, a prominent member of the Committee on Interstate and Foreign Commerce, on February 7, 1906, enumerated the main propositions of the bill[20]:

"Now, you wish to know what we have attempted to do through the Hepburn bill. Let me briefly enumerate the main propositions of this measure. What does the bill do?

(*a*) Enlarges definition of the common carriers covered by putting under the provisions of the act all railroads transporting passengers or property from one State to another, without regard to whether they are used for such transportation under a common control or arrangement or for continuous shipment, thus permitting the establishment by the Interstate Commerce Commission of compulsory through routes for shipment where the companies have failed to establish such through routes, and the authority to do this is expressly conferred upon the Commission.

"(*b*) Enlarges the definitions of the terms 'railroad' and 'transportation' by expressly including un-

[20] 40 Cong. Rec. 2243-2244 (1906).

der the one all terminal facilities and under the other services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported when such services are not exempt from the provisions of the act as stated therein.

* * * * *

"(*h*) Provides that the allowance made by the carrier to the owner of the property transported for service, private cars, etc., furnished by him, shall be no more than is just and reasonable, and the Commission may determine the maximum charge to be allowed."

MR. HEPBURN finally summarized the purposes of the bill, saying[21]:

"Mr. Chairman, with reference to the differences of opinion that have prevailed in regard to some features of the bill, I do not now care to say anything, but we were agreed in regard to two fundamental propositions: One was the investment of the Interstate Commerce Commission with the measure of power, the full measure of power, that the President in his message said he thought they ought to have. That we have done. Then to include by changes enlargement of the definition of the word 'railroad' and 'transportation,' to bring in all of those auxiliaries, or aids, or instrumentalities through which so many frauds and wrongs in the nature of rebates and discriminations have occurred. We believe that we have done that. These we regard as the two essential things. The other changes or provisions that there are in this bill are simply changes of existing law, so as to make more easy, more certain, the administration of the power that the Commission now has."

The bill was passed by the House on February 8, 1906, by a vote of 346 to 7, with 10 members "present", and 29 not voting.[22]

The bill as passed by the House contained no commodities clause. The only proposal of such was an amendment

[21] 40 Cong. Rec. 2255-2256 (1906).
[22] 40 Cong. Rec. 2303 (1906).

to the Hepburn bill providing that no railway official or employee should be interested directly or indirectly in the furnishing of material or supplies to a mining company.[23] The amendment was objected to by MR. HEPBURN, and was withdrawn.[24]

[23] 40 Cong. Rec. 2090 (1906).
[24] 40 Cong. Rec. 2256-2257 (1906).

THE COAL-CARRYING RAILROADS

Although, as previously indicated,[1] the Interstate Commerce Commission, after several investigations of coal-carrying railroads,[2] had made rather limited remedial recommendations, the situation was deemed so serious that a resolution was introduced in the House of Representatives by MR. GILLESPIE requesting the Attorney General to furnish information concerning certain coal-carrying railroads.[3] This resolution, which was referred to the Committee on Interstate and Foreign Commerce, was not reported. When MR. GILLESPIE attempted to present a privileged resolution to the same effect, it was ruled out of order as calling upon the Attorney General to express an opinion.[4] Later, the resolution was modified so as to request the President to report with respect to an alleged merger of the Pennsylvania and other bituminous coal-carrying railroads, and, as thus amended, was passed without a roll call.[5]

MR. GILLESPIE, the following day, introduced another resolution, more specific in nature, authorizing the President to direct the Interstate Commerce Commission to discover whether common carriers doing an interstate business, or officers or employees of such carriers, own or have any interest in the bituminous coal mines producing the coal carried over their lines.[6] This resolution was referred to the Committee on Interstate and Foreign Commerce but was not reported.[7] Other resolutions and

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[1] *Supra*, pp. 10-13.

[2] *Haddock v. Delaware, L. & W. R. Co.*, 3 I.C.R. 302 (1890); *Coxe Brothers & Co. v. Lehigh Valley R.R. Co.*, 3 I.C.R. 460 (1890); *Red Rock Fuel Co. v. Baltimore and Ohio R. Co.*, 11 I.C.R. 438 (1905).

[3] H.Res. 125, 59th Cong., 1st Sess.; 40 Cong. Rec. 779 (1905).

[4] 40 Cong. Rec. 1240 (1906).

[5] 40 Cong. Rec. 1701 (1906).

[6] H.Res. 260, 59th Cong., 1st Sess.

[7] 40 Cong. Rec. 2198 (1906).

joint resolutions, to the same effect, were introduced, referred to the Committee on Interstate and Foreign Commerce, and not reported.[8]

While the Hepburn bill was under consideration by the House of Representatives, Senator TILLMAN presented the Senate a letter from the President of the Red Rock Fuel Company,[9] of Upshur County, West Virginia, alleging that the company was unable to develop some 4,000 acres of its coal lands because of the refusal of the Baltimore and Ohio Railroad Company to make proper connections between the tracks of its railroad and the private switches of the mining company, even though the latter had agreed to pay the entire cost of making such connections; and that the Baltimore and Ohio owned a controlling interest in various coal companies along its line of railroad, and was engaged in marketing its own product.[10] The Interstate Commerce Commission had made an order requiring the railroad to discontinue this discrimination, allowing one month for the furnishing of the requested connection.[11]

The *Red Rock Fuel Company* case led the Governor of West Virginia, in a letter to Senator TILLMAN, to declare that

> "An investigation would show that the Baltimore and Ohio Railroad Company is interested in the production of coal. * * * It may be that the Pennsylvania does not legally own a controlling part of the stock of the Baltimore and Ohio Railroad Company, or the C. & O. Ry. Co., or the N. & W. Ry. Co., but I have no doubt that an investigation will show that the Penn-

[8] H.J.Res. 101, 59th Cong., 1st Sess., by Mr. Campbell.; H.Res, 276 59th Cong., 1st Sess., by Mr. McNary of Massachusetts. Chairman Hepburn had earlier defended the failure to report such resolutions on the ground that his Committee had been engaged upon public matters of superior importance. 40 Con. Rec. 1702 (1906).

[9] See footnote 2, *supra*.

[10] 40 Cong. Rec. 1671-1672 (1906).

[11] *Red Rock Fuel Co. v. Baltimore and Ohio R. Co.*, 11 I.C.R. 438 (1905).

> sylvania Railroad Company practically controls these three great trunk lines which traverse West Virginia. * * *. Hence it is a fact that West Virginia is today in the grasp of a railroad trust which practically says what part of the state shall be developed, and what shall not be developed, how much coal shall be shipped out of the state, to what points * * * it shall be shipped, and when * * *." [12]

When MR. GILLESPIE failed in his efforts to have the House pass a comprehensive measure for an investigation, Senator TILLMAN introduced S.J.Res 32, 59th Cong., 1st Sess.,[13] to authorize the Interstate Commerce Commission to conduct an elaborate and detailed investigation into all forms of alleged relationships sustained by railways and railway officials toward mining interests, all agreements or conspiracies among any roads looking to the monopolization or the control of coal mines or coal or any other traffic, and all customs and practices of granting transportation facilities that appeared to be unfair or discriminatory in their nature. This resolution was somewhat similar to the GILLESPIE resolution in the House, but was more specific and much broader in scope. The TILLMAN resolution was passed by the Senate on the same day introduced, February 12, 1906.[14]

On February 19, 1906, the Supreme Court of the United States handed down its decision in *New York, New Haven & Hartford R. Co. v. Interstate Commerce Commission*,[15] enjoining the Chesapeake & Ohio Railway from violating prohibitions of the Act to Regulate Commerce against undue preference and discrimination. It enjoined the taking of less than the published tariff rates by means of dealing in the sale and purchase of coal. It enjoined a practice of stipulating to sell coal and transport it at

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[12] 40 Cong. Rec. 2276 (1906).
[13] 40 Cong. Rec. 2424 (1906).
[14] 40 Cong. Rec. 2431 (1906).
[15] 200 U.S. 361, 26 Sup. Ct. 272, 50 L.ed. 515 (1906).

an agreed price insufficient to yield the published freight rates after deducting the cost of purchase and delivery.[16] While the Court based its decision entirely upon the departure from the published rates, it recognized that this construction might make it impossible for a carrier to deal in commodities.

Within a few days after this decision was rendered, the House Committee on Interstate and Foreign Commerce reported the TILLMAN resolution, broadening it to include oil and oil properties.[17] It was passed by the House as amended, and the Senate concurred in the amendment.[18]

President Theodore ROOSEVELT approved the resolution, but expressed doubts as to its efficacy, for reasons which he very clearly expressed, but which need not here be detailed.[19] In an endeavor to eliminate the doubts raised by the President, a new joint resolution was introduced.[20] As finally passed, the Interstate Commerce Commission had ample authority to make the investigation contemplated by the TILLMAN resolution.[21]

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[16] For opinion of the Court, see *infra*, pp. 127-155.
[17] 40 Cong. Rec. 2885 (1906).
[18] 40 Cong. Rec. 2886-2888 (1906).
[19] Senate Document 256, 59th Cong., 1st Sess. (1906).
[20] H.J.Res. 115, 59th Cong., 1st Sess.
[21] 40 Cong. Rec. 3852, 3875-3876 (1906).

HEPBURN BILL REPORTED BY SENATE COMMITTEE ON INTERSTATE COMMERCE

The HEPBURN bill, upon passage by the House,[1] had been referred to the Senate Committee on Interstate Commerce.[2] On February 26, 1906, the bill was reported out of that Committee without amendment,[3] but with the understanding that members of the Committee reserved the right to offer amendments to the bill and to vote for them while it was under consideration by the Senate. The report throws no light on the subject here under consideration.

[1] 40 Cong. Rec. 2303 (1906).
[2] 40 Cong. Rec. 2968 (1906).
[3] 40 Cong. Rec. 2968 (1906); Senate Report No. 1242, 59th Cong., 1st Sess., Part 1.

VIEWS OF SENATORS TILLMAN AND ELKINS—MINORITY REPORT ON HEPBURN BILL

When the HEPBURN bill was reported to the Senate, Senators ELKINS and TILLMAN gave expression to their views with respect to needed legislation.

In the formal report to the Senate,[1] Senator TILLMAN said that—

> "There should be a provision * * * to divorce absolutely the business of transporting freight as a public carrier and the business of producing freight to be transported. * * * No public carrier engaged in interstate commerce should be allowed to produce and transport any article for sale beyond such as are necessary for its own consumption."

The views of Senator TILLMAN were printed in the Congressional Record of March 15, 1906.[2] The Record reads as follows:

> "Mr. TILLMAN, having reported from the Committee on Interstate Commerce House bill 12987 without amendment, submits his views thereon as follows:
>
> The peculiar circumstances under which this bill was reported to the Senate from the Committee on Interstate Commerce make it a difficult and somewhat embarrassing task to write a report upon it.
>
> Instead of being amended in committee, as is usual, so as to command the indorsement and support of a majority of its members, the bill was brought into the Senate in a form not entirely satisfactory to more than two members. Party lines in the committee were broken down and the bill is in the Senate by reason of the union of five members of the minority party and three members of the majority party in Congress who concurred in reporting it favorably; and while

[1] Senate Report No. 1242, 59th Cong., 1st Sess., Part 1, p. 11 (1906).
[2] 40 Cong. Rec. 3834-3837 (1906).

these eight Senators are agreed as to the general purpose and scope of the bill, there are radical differences among them as to the amendments that ought to be incorporated in it to make it fully adequate to meet the demands of the business interests of the country at this time.

This lack of harmony among the supporters of the bill—it would be speaking with more accuracy to say the supporters of the policy involved in the bill brings about the anomalous situation in which a member of the minority party in Congress is put in charge in the Senate of proposed legislation which is generally regarded throughout the country as the cherished scheme of the President, with whose general policy and principles that member is not in accord. At the same time the bill is designed to carry into effect his own long-cherished convictions and the thrice-reiterated demands of the party to which he belongs."

* * * * *

(a) THE WEST VIRGINIA SITUATION.

"The necessity for granting, at some time, relief to producers and shippers in several important particulars not provided for in this bill may be wisely considered in connection with the pending discussion. There is no provision, except a most vague and indefinite one, for the anomalous and outrageous condition of affairs disclosed as existing in West Virginia. The letter of Governor Dawson of that State published in the CONGRESSIONAL RECORD of February 8 and the memorial of the Red Rock Fuel Company published in the RECORD of January 29, taken together, disclose a situation that is almost beyond belief. The railroads have seized on the vast mineral wealth of the State in its extensive coal fields and have created a monopoly in that prime necessity of life, fuel.

Landowners who wish to mine and ship their coal are denied access to market, while the roads themselves are engaged extensively in mining and shipping coal; and when private individuals or companies seek to develop their coal lands and send their product to

market the railroads deny or refuse to grant them the privilege of engaging in interstate commerce. In the case of the Red Rock Fuel Company physical connection was refused. They would not permit this coal-mining company to join its track with a switch to the track of the Baltimore and Ohio Railroad and thus obtain an outlet. In other cases mines have had to shut down because of the denial of cars by the railroads. The coal output, in effect, is controlled absolutely by the railroads in their own interest, and in the case of this particular State the infamy of the situation is aggravated by the fact, which is practically proven, that the three railroad systems entering West Virginia are controlled by an outside road, the Pennsylvania.

There are many other instances in which the proof has been furnished of even more outrageous abuse of power than in the instance cited of the Red Rock Fuel Company case. Where connections between the mines of private companies were already in existence under arrangements made some years ago, the tracks have been torn up, and virtual confiscation of the property is threatened. Vested with the rights of eminent domain to construct their lines and granted liberal franchises and charters, the railroads designed to be public carriers for the benefit of the whole people, in the last few years have become rapidly transformed into the veriest band of robbers—highwaymen who do not thrust their pistols in the faces of their victims and demand money or their lives, but who levy tribute in freight rates which are as high as the traffic will bear, deny access to market, monopolize with brazen effrontery one of the prime necessities of life—coal—and in every way show their absolute contempt for the people and the people's rights.

The condition of affairs in West Virginia is even worse in Pennsylvania, and from every part of the country come reports that the railroads have practically already obtained control of almost all the coal lands, and where they have not bought the land itself they have obtained mineral leases and are rapidly carrying out the scheme of monopolizing the fuel sup-

ply of 85,000,000 people. In Pennsylvania it is charged that they have for years controlled absolutely the State government, and they snap their fingers in contempt at any and every effort to enforce the law and the constitution which prohibits the ownership of coal mines by public carriers. It will be a task of immense difficulty to undo the incalculable mischief and wrong that has already been done.

The plea of vested rights and the complications from the secret transfers, the purchase by holding companies and trust companies, the ramifications of partnerships and of trusteeships, and of other subtle agencies contrived by hundreds of the best legal minds in the country, whose services are at the command of these gigantic corporations, will require firmness, perseverance, and patience by Congress to grant relief from existing conditions and safeguard the public interests in the future. It is our bounden duty to amend this bill so as to compel every public carrier to give the freest possible access to market to every producer who wishes to engage in interstate commerce.

We should incorporate an amendment in the bill which will compel all railroads to make connections with any and every other railroad, public or private, and grant just and fair traffic arrangements, so as to put every producer upon an equal footing with every other producer. There should also be a provision incorporated in this bill to divorce absolutely the business of transporting freight as a public carrier and the business of producing freight to be transported. The temptation to discriminate against competitors on the part of a public carrier is too great, and it stands to reason that a producer who controls the means of transportation to market at the same time will discriminate against and will in the end destroy every competitor who is in the same business with him."

(b) DIVORCE PRODUCTION AND TRANSPORTATION.

"Inasmuch as the railroads are creatures of the State, brought into being for a specific purpose, the public welfare demands that they shall be compelled

to confine their operations and content themselves with pursuing the legitimate business for which they were created and not monopolize and destroy the interests which they were made to serve. It therefore appears to me as a matter of transcendent importance and necessity that no public carrier engaged in interstate commerce shall be allowed to produce and transport any article for sale. Where a railroad owns coal lands it may and should be permitted to mine the coal which it itself consumes, but that is as far as it should be allowed to go.

In concluding this imperfect presentation of my views on this all-important subject I wish to speak a word of caution to the friends of the proposed legislation. Our full expectations may not be realized at the present session of Congress. The opponents of effective legislation are alert, have had large experience, and are thoroughly organized."

Senator ELKINS, of West Virginia, was Chairman of the Committee on Interstate Commerce. In submitting the views of the majority of the Committee, he declared that—

"The bill should compel the separation of the business of railway transportation from the business of manufacturing or otherwise producing the article transported."[3]

The minority report recommended amendments to—

"Divorce transportation and production by restricting public railway carriers to the performance of their functions as such and restraining them from entering the fields of mining and manufacturing, or in any other way becoming competitors with those to whom their services are offered and sold."[4]

On April 6, 1906, Chairman ELKINS discussed the Hepburn bill and its deficiencies, saying:[5]

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[3] Senate Report No. 1242, 59th Cong., 1st Sess., Part 2, pp. 3-10. While this report is dated February 27, 1906, it was not actually presented to the Senate until June 28, 1906. See 40 Cong. Rec. 9505 (1906).

[4] See note 3, *supra*.

[5] 40 Cong. Rec. 4832-4835 (1906).

"Mr. President, I desire to approach the consideration and discussion of this most important subject in a spirit of fairness and impartiality, with a sincere purpose to do justice to all interests concerned, and above all to secure to the people a prompt and adequate remedy for the evils, injustices, abuses, and wrongs of every kind practiced by railroads, or in any way growing out of their operation.

I desire now to bring to the attention of the Senate what I consider omissions of necessary provisions in the Hepburn bill, and discuss the same from a practical and legal standpoint.

The main purpose of the Hepburn bill, among other things, is to provide a more efficient remedy against excessive rates in which all agree. I regret to say, however, that there are evils, injustices, and abuses by railroads for which the bill does not even attempt to provide a remedy. It makes no provision:

First. To prevent interstate carriers producing, mining, and selling coal, iron ore, and other products which they transport in competition with shippers, thereby oppressing and driving out of business the independent operator and absorbing his business.

Second. To oblige interstate carriers, on application of shippers of interstate commerce, to put in when needed, upon reasonable terms, switches to enable such shippers to get their products to market. There are instances where shippers have spent hundreds of thousands of dollars in equipping mines and mills to do business, and railroads have denied them switches and connections.

Third. To compel interstate roads to make prompt and suitable connections with connecting branch and lateral lines, as well as just, fair, and reasonable prorating arrangements with the same and allowances for originating freight.

Fourth. To require interstate carriers to make a fair and just distribution of cars among shippers on their lines.

These four omissions and, I may say, abuses on the part of the railroad have aroused public sentiment almost to an alarming degree in West Virginia, and the chief objection of her people to the bill is that no remedy whatever is prescribed in the bill to correct all or any one of these abuses.

* * * * * *

I have introduced amendments covering these omissions in the bill and sincerely hope they will be adopted by the Senate. Nothing short of their adoption and becoming law will satisfy the shippers, independent operators, and the people generally of my State.

* * * * *

I have just named four omissions in the bill: First, the interstate railroads do not put in switches and sidings upon a reasonable request from the shippers to enable them to do their business; secondly, they do not make connections with branch or lateral lines and prorating arrangements, so that the branch line can live and shippers on those lines ship their products to market. They do not provide fair distribution of cars. There is no provision in the bill to correct these abuses. Another thing is that there is nothing in this bill to prohibit a railroad from owning, mining, and selling coal in opposition to shippers.

* * * * *

* * * One of my amendments goes right to that point, that the carrier shall be confined to doing the business for which it is incorporated, namely to transport freight and passengers and do no other business, and, as the Senator has said, that would be very helpful in the line of securing a fair distribution of cars.

* * * * *

The most important amendment is the one providing that interstate lines shall make prompt connections with connecting branch or lateral lines, and fair, just and reasonable prorating arrangements with them. It can hardly be hoped that another trunk line will be built to New York, Boston, Philadelphia, or Baltimore. Entrance into these cities by another trunk line is almost impossible. The cost and obstacles to be over-

come make it prohibitory. In a less degree the same might be said of the great cities of the Union, especially Chicago, St. Louis, San Francisco, and Cincinnati. The people must, therefore, in the future depend largely for the further development of the country and continued increase in business upon short lines of railroad reaching rich sections. This is especially the case in the great State of West Virginia, one of the richest in the Union.

Unless the interstate railroads, reaching all the large cities and markets, make fair connecting and prorating arrangements with branch and lateral lines, the business and development of the country must be retarded. These great railroads already have immediately along their lines all the business they can do at present, and they hold that no one else should build necessary branch and lateral lines in what they term their territory. That is the assumption of these great lines, that it is "their territory," and if anyone attempts to build a branch or lateral line it is an invasion of this terrifory. There are many men who can build 10, 20, 50, or 100 miles of railroad to connect with interstate lines who could not possibly build a trunk line.

In the State of West Virginia and other States there are many men who have made large investments in agricultural, coal, timber, iron-ore, and other lands who are able and desirous of building short lines from 10 to 100 miles long to reach these lands and find a market for their products, but they will not build them under present conditions because of the difficulties in the way of getting switches and connections with the interstate lines, and when they do get them, securing fair treatment. Men can not afford to take this risk without the law guarantees them protection, and the people look to Congress to provide this protection in the bill under consideration.

CONSIDERATION OF THE HEPBURN BILL BY THE SENATE

The HEPBURN bill was debated in the Senate over a period of several weeks.[1] During the course of the consideration of the bill, certain statements were made which appear to throw light on the purpose and intent of the "Commodities Clause," and these statements are herein reproduced.

On April 6, 1906, Senator GAMBLE, after disclaiming any purpose to detain the Senate with an extended discussion of the questions raised by the bill, said:[1]

> "Although much has been accomplished by the ELKINS Act on the subject of rebates, it can not be claimed that this evil has been eradicated. With the fuller powers given to the Commission in this bill, and with the enlarged jurisdiction extended over all related instrumentalities connected with transportation, I believe it will have a most wholesome effect and will strengthen the present law looking to the correction of this evil."

Senator LATIMER, on April 12, 1906, made this statement:[2]

> "The pending bill, known as the HEPBURN bill, seems to me to embrace in the main all of the essential features needed in a bill of this character. It provides for the public inspection of rates, fares, and charges made by the railroads for the transportation of property and passengers; that all service rendered shall be reasonable and just, declaring unlawful any unjust and unreasonable charge for any service. It also provides that the railroads shall make an annual report and shall furnish to the Commissioners any information which they desire; that the Commission shall have jurisdiction over private cars, elevators,

[1] 40 Cong. Rec. 4846-4849 (1906).
[2] 40 Cong. Rec. 5123-5124 (1906).

refrigerators, terminals, private switches, and all other means and devices used by the railroads."

On the same day, Senator FORAKER recalled that the Senate Committee on Interstate Commerce, of which he was a member, had been studying the subject of railroad legislation, and that throughout the hearings held by the Committee the complaints were not about excessive rates but were about rebates and discriminations. Senator FORAKER said:[3]

> "We were studying it most conscientiously. We were hearing all who came, whether the representatives of shipping interests or the representatives of railroad interests, getting all the light, getting all the information as to what we should do with respect to it; and in all that hearing, from the beginning to the end, not one single witness ever told us about excessive rates. Go search the record and ascertain. It was all about rebates; it was all about discriminations.
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> . . . . .
>
> So the House took up this subject with a view of dealing with all these complaints, and they considered rebates in all the various forms in which they have been allowed, not only rebates granted and paid in money, secretly or openly, but rebates allowed by discriminations—by allowance for terminal roads, for elevator charges, for icing charges—rebates of every character and description that could be thought of. Every kind of a rebate that human ingenuity could devise was talked about, and discriminations of every character were testified about, and they considered them in the House; discriminations as to localities, discrimination by means of relative rates that were unjust."

On May 4, 1906, Senator DOLLIVER, another member of the Committee on Interstate Commerce, said:[4]

> "Mr. President, the complaints are pretty numerous

[3] 40 Cong. Rec. 5129 (1906).
[4] 40 Cong. Rec. 6375-6376 (1906).

that the House bill is crude and awkward in its construction, and therefore unpalatable to the Senate.

* * * * *

There is some force in what my friend from North Dakota says about the regulation of a man's business who owns the car and the merchandise which the car carries. I think it will not be disappointing, however, to the Senator from North Dakota if I call his attention to the fact that this bill seems to have been drawn after some possible crude meditation on that subject. If he will examine section 15, which is the great remedial section of this proposed statute, he will find, on page 12 of the printed bill, this provision:

> If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

I am not prepared to say that that provision is a perfect protection in the matter to which the honorable Senator refers, but, if it is to be made more perfect, I think it is not out of the way for me to suggest to him that an amendment offered to section 15 covering that point would be appropriate."

Genesis of Commodities Clause

It was not until May 7, 1906, that the genesis of the "Commodities Clause" was proposed. On that day Chairman ELKINS proposed that the following be added at the end of section 1—[5]

"It shall be unlawful for any common carrier subject to the provisions of this act, unless authorized by

[5] 40 Cong. Rec. 6455 (1906).

its charter to do so, to engage, directly or indirectly, in the production, manufacture, buying, furnishing, or selling of coal or coke or any other commodity or commodities of commerce in competition with any shipper or producer on its line or lines: Provided, That nothing in this act shall be construed to prevent a carrier from mining coal exclusively for its own use."

Senator DOLLIVER inquired whether it was the purpose of this amendment to prevent a common carrier from engaging in the mining of coal or any other business, if the operations are not conducted upon its own line. To this inquiry Senator ELKINS made this reply:[6]

"Mr. President, I want to confine the railroads to the legitimate business for which they are incorporated—the transportation of freight and passengers—and to forbid them engaging in any other business, especially the business of mining, producing and selling coal or any other commodity on their lines in competition with a shipper.

* * * *

I do not agree with the Senator from Texas [Mr. BAILEY]. It seems to be the language of the amendment is plain and unmistakable and that it meets the objection raised by the Senator from New Hampshire [Mr. GALLINGER]. What I am aiming to do is to prohibit interstate roads, carriers of interstate commerce, from engaging in or doing any other business than the transportation of freight and passengers.

* * * *

Mr. President, I want to get this amendment in such shape that it will stop an evil or an abuse that obtains in West Virginia, Pennsylvania, and other coal-mining States. The Supreme Court of the United States, in a recent opinion in a case coming up from West Virginia, decided that under the existing law railroads can not engage in the mining, manufacturing, and selling of coal.

* * * *

[6] 40 Cong. Rec. 6456-6457 (1906).

I understand what the Senator means. I do not mean to say that they have decided it definitely, but they intimated in a way that is notice to the country and to Congress and to everybody concerned that the railroads were not empowered to produce and sell coal. I thought, following that intimation, it would be better to put into the statutes of the United States a positive prohibition that railroads should not engage in the mining and manufacture and production and selling of coal and coke, and that they should be confined to the legitimate business for which they were chartered, to wit, the transportation of freight and passengers."

Senator ELKINS then modified his original amendment to read as follows:[7]

"It shall be unlawful for any common carrier engaged in the production, manufacture, buying, furnishing, or selling, directly or indirectly, of coal, coke, or any other commodity of commerce to engage in interstate commerce: Provided, That nothing in this act shall be construed to prevent a carrier from mining coal or furnishing or producing other commodities exclusively for its own use."

Senator SPOONER, following the introduction by Senator ELKINS of his modified amendment, gave this explanation of its purpose:[8]

"Mr. President, the evil sought to be remedied by this amendment is one as to the existence of which there can be no question. I think it has relation principally to the mining of coal. Companies engaged in interstate transportation, even though engaged lawfully in the States in mining and producing coal, have been able to freeze out independent operators. They have been able thereby to diminish the output of a necessary of life, and to put upon consumers throughout the country a price to suit their own will. That ought to be remedied. But the Senator who believes that it is a subject free from difficulty and intricacy I

[7] 40 Cong. Rec. 6457 (1906).
[8] 40 Cong. Rec. 6459 (1906).

think makes a very grave mistake. It requires much thought, more thought, I think, than has been bestowed upon it in the preparation of this amendment."

Senator TILLMAN warned against hasty and ill-advised action on so complex a problem, saying:[9]

"Mr. President, I think when Senators consider this question a little more they will find that there are other sides to it which will add to its perplexities. Granting that all of us are earnestly desirous of accomplishing the result of divorcing production and transportation—and I have heard no objection to it, stated in a general way like that, from any source—the more you consider it the more troublesome it grows. At least that has been my experience, and I have been thinking a great deal about it, and I have had suggestions from various sources. I have asked half a dozen great lawyers to suggest amendments; each and every one of them differ; and as yet I have not been able to get any satisfactory solution so far as my own mind goes.

Now, I will state some of my perplexities. This amendment deals with the three great problems: First, of monopoly—the railroad controlling coal lands and freezing out competitors who are engaged in the business as private owners. Second, it deals with the question of discrimination—preventing a fair deal between the private owner and the railroad by distribution of cars and access to market. It also deals with the more perplexing question or idea of the destruction of private interests.

For instance, suppose we should limit the engaging in interstate commerce of a public carrier to the production by others, forbidding transport beyond the State line of any article which he himself was producing, what would become of that class of cases or those conditions in some region where the country is sparsely settled and where there is a great lumbering industry—that is, a great deal of lumber standing in

[9] 40 Cong. Rec. 6460 (1906).

trees? I have known half a dozen railroads in the South, in my own limited scope of view, that have been built entirely and solely for the purpose of hauling out the lumber from the swamps and backwoods to get it to market; and but for the fact that the lumbermen built their own road they absolutely would have had no market for their product.

Take Coal. Go into West Virginia and you find in some of these coves and backwoods large and rich deposits of coal which will lie there—I will not pretend to guess how long, but fifty or a hundred years—undeveloped and unproductive, lacking in value to the present owners, if you say to a company, "You shall not buy this coal and construct a road to market your coal and get it out so as to put it on the market." So you will put a ban on those lands and they will lie there useless.

I take West Virginia as an illustration, because I have had a great many communications from down there complaining about the discrimination and injustice of the Baltimore and Ohio and the Chesapeake and Ohio in their dealings with private operators. Lots of those people have been bottled up, but those little roads have been built primarily for the purpose of getting to the through roads or interstate-commerce roads. While they will transport small quantities of other products, they will build primarily and solely for the purpose of marketing the coal which they have bought, and without the coal there would have been no road, and without the road the coal is valueless. So if you say a man who undertakes to build his own road solely for the purpose of marketing his own coal shall not continue to run the railroad, you put up a barrier to his utilization of his own property.

As I said, you can not have any sweeping and general provision here without doing serious injury somewhere. The more I think about it the more I consider the condition in the anthracite field where this coal monopoly already exists, where the five railroads penetrating the anthracite field have absolute domination over every ton of coal and have parceled out the product and fixed the price. You see the perplexity and

the difficulty of legislating along this line without seriously jeopardizing somebody's interests.

Now, I want to stop it. I want Senators to consider seriously the various aspects and difficulties involved. While the amendment offered by the Senator from Mississippi [MR. McLAURIN] will go a long way toward helping, it will itself bottle up and destroy private interests in ownership in coal lands which can never be utilized or reach the market unless the man who owns the land shall also be allowed to build a railroad to get to market.

So, Senators, you will not quickly dispose of it in any wise and judicious way. By careful consideration we may be able to discover a method by which we can accomplish what we seek to do, but unless we are very cautious we will make a mistake, and we had better go not quite far enough than to go too far."

Senator McCUMBER agreed that railways as common carriers should be divorced from engaging in any character of business in competition with any person, firm, or corporation, but believed the modified Elkins amendment, as proposed, to be unconstitutional.[10]

Following an inquiry by Senator DRYDEN, Senator DICK, said:[11]

"Mr. President, the inquiry of the Senator from New Jersey [MR. DRYDEN] is both pertinent and important. Either the time should be extended very considerably or this matter should be dealt with in an entirely separate bill. In the first place, we recall that some years ago the iron masters of Pittsburgh constructed a railroad, extending through a part of the State of Pennsylvania and a part of the State of Ohio, to reach the ports of Lake Erie for the purpose of carrying iron ore from the Lake ports to Pittsburgh because of extortionate rates charged them by the railroads. If this amendment is adopted and that

[10] 40 Cong. Rec. 6494 (1906).
[11] 40 Cong. Rec. 6496 (1906).

road is still in the possession of the men who constructed it, they must either go out of the business of manufacturing steel or the business of common carriers.

Again, we adopted in the early part of the voting an amendment putting pipe lines into the list of common carriers; and the men who own pipe lines, whether the companies are large or small, will be compelled, if this amendment is adopted, either to go out of the business of pumping and refining oil or out of the business of conveying it.

Within a few days the Committee on Territories favorably reported a bill chartering a railroad in the district of Alaska, its purpose being largely to mine coal and other minerals, and the bill grants certain coal-mining privileges in that district. The company means to mine that coal, to convey it to a seaport, and thence to the Pacific coast. It will have to change these arrangements, and perhaps abandon the enterprise altogether, if it is confined entirely to the business of a common carrier and prohibited from engaging in the business of mining.

Ample illustrations might be given, in addition to the illustration made by the Senator from New Jersey or the one made previously by the Senator from South Carolina [MR. TILLMAN], when he referred to the lumber industries of the South. It extends still further. Great companies are mining iron ore in Michigan and in Wisconsin. They own vessels for the transportation of that ore from where it is mined to points where it is consumed in the manufacture of steel. They will have to go out of the business of mining or out of the business of common carriers.

So that, in all its ramifications, this question is so great, it affects so many interests, not only the interests of capital, but the interests of labor as well, that it seems to me the question itself is quite as important, and perhaps of even greater importance, than this matter of railroad-rate regulation, in that railroad-rate legislation has been a question that has been dealt with by Congress for more than twenty years.

This very bill is but a conformation of old legislation to newer conditions, but this particular question is a new and a very important question. It is to be hoped the Congress will see that it is a wise thing to do to defer action upon so important a matter until the pending rate legislation is out of the way and it can be dealt with as a separate and distinct proposition in important legislation."

Then, Senator ELKINS made this statement with respect to the purpose of his modified amendment:[12]

"Mr. President, the purpose of introducing this amendment was to correct an abuse and evil growing up in the State of West Virginia and in other mining States, owing to the fact that railroads engage in competition with producers on their lines."

Thereupon consideration of the subject was ended for that day. On the following day, May 8, 1906, Senator McLAURIN, a member of the Committee on Interstate Commerce, proposed the following as a substitute for the pending ELKINS amendment:[13]

"It shall be unlawful for any corporation that mines or manufactures or produces any article or commodity of commerce for sale to engage in the business of interstate commerce as a carrier of any of its own product, mining, or manufacture; and it shall be unlawful for such corporation to charge, demand, collect, or receive any money or other thing for the carriage, as a carrier of interstate commerce, of any of the like kind of articles or commodities produced, mined, or manufactured by any other person, company, or corporation; and for a violation of this provision the person paying such charge or demand may recover in any State or Federal court having jurisdiction of the subject-matter an amount triple the amount so collected or paid, together with all costs of collection, including attorney's fees and costs of travel to and from and attendance upon court. If any such cor-

[12] 40 Cong. Rec. 6496 (1906).
[13] 40 Cong. Rec. 6497 (1906).

poration shall engage in the business of a carrier of such articles or commodities as intrastate carrier it shall be unlawful for such corporation to engage in interstate commerce as a carrier of any kind of commerce."

Thereupon, Senator ELKINS said:[14]

"What I am contending for in this amendment is that the independent operator, the individual mine owner, shall be protected in his business against the rapacity and injustice of railroads owning coal lands. No independent operator, no small mine owner, can afford to engage in competition with a railroad company that owns twenty or thirty or forty thousand acres of coal doing business in the same locality. I say it is perfectly competent for Congress to pass such legislation. The law of West Virginia on this subject has been sustained. Congress by proper laws should forbid railroad companies from engaging in any business in competition with shippers on their lines.

* * * * *

Railroads in recent years have been chartered and organized primarily for one purpose—namely, to transport freight and passengers. Nothing else. Fifty years ago I admit that the Reading, the Lehigh Valley, the Pennsylvania, and other roads, under special acts of the legislature, had the power conferred upon them of owning coal lands and mining and selling coal, which they have exercised for all these years. I do not want to interfere with these powers, but for the future I want it to be clearly understood that all interstate roads shall refrain from engaging in such business.

I do not know of any intrastate roads. There may exist in a State a road 50 or 100 or 200 miles long, but all these roads do interstate business, and doing that, it has been decided they become interstate carriers and interstate roads. I believe in confining strictly and positively railroads to doing two things—the transportation of freight and the transportation of

[14] 40 Cong. Rec. 6498-6499 (1906).

passengers and engaging in no other business of any kind whatsoever, directly or indirectly.

* * * * *

Mr. President, I know it is sought to sidetrack this amendment that corrects a great abuse and injustice. I know we are dealing with rates and trying to prohibit excessive rates, but there are abuses and evils produced by railroads far greater than excessive rates. The great evils and abuse are the kind I have mentioned. Rebates and discriminations are prohibited now by stringent laws. Now, another abuse by railroads is they refuse at times to give switches to shippers of interstate commerce. They will not give physical connection. If we are going to regulate railroads, if we are going to correct abuses let us correct the real abuses that oppress the people and drive them out of business. What I complain of in this bill is that while it is a good bill as far as it goes, it does not go far enough. It does not correct the very abuse I am trying to bring to the attention of the Senate. It does not provide that where an interstate shipper is prepared to operate he shall have the right of switch connection. It does not provide that connecting lines shall have connections and fair, just, and reasonable prorating arrangements. Those are abuses of which the people of West Virginia complain, and they are evils which I should like to see corrected in this bill.

Mr. President, I think it is plain, in the words of the substitute offered by the Senator from North Dakota, that if common carriers are engaged in mining and selling coal or coke or other commodities along their lines in competition with shippers, it should be prohibited. That is a plain, simple proposition. It is an evil and an abuse, and if it is not checked it will enable the railroads of the country to absorb the mining business along their lines to any extent."

Senator BACON said: [15]

"Mr. President, I am very much inclined to the opinion, as has been expressed by several Senators,

[15] 40 Cong. Rec. 6499 (1906).

that this is a matter we should not attempt to deal with in the pending bill. It is a bill to regulate railroads in the matter of transportation rates and fares for passenger transportation. It is an impossibility to make it a cure-all for all the evils which may exist in the operation of railroads. This is an extremely difficult question and one in which almost certainly there is an evil which should be remedied by legislation, but it is one which affects so many interests that it is extremely important that whatever is done should be done with the utmost care.

I have in my hand the opinion of the court in the Chesapeake and Ohio case. I have not had the opportunity to give it the very careful examination which one ought to give to attempt to discuss it or to predicate an argument upon its rulings. I had only seen heretofore the newspaper accounts, and I have had an opportunity to look at this decision only this morning, since the Senate has been in session. As I understand, though, in the hasty examination which I have been able to give it, the particular point ruled by the court was this: It was charged that the Chesapeake and Ohio Railroad Company sold and agreed to transport and deliver to the New York and New Haven Railroad Company coal at a rate which represented in the aggregate less than the cost of the coal and the rate of transportation as published by them as their regular rate, and that therefore it amounted to a system of rebates.

* * * * *

That is an extremely difficult question, and it is one which not only will affect illegitimate enterprises, if I may so denominate them, but it is one which will affect legimate enterprises, and therefore it should be regulated with great care, so as not in any manner to do unwanted injury to those legitimate enterprises.

I will give an illustration. Of course, in these matters the fact that it will affect industries in our particular localities naturally occurs to Senators. The Senator from Pennsylvania instanced the case of the lumber trade in North Carolina, and that is true also in the State of Georgia. The southern half of the

State of Georgia is a timber-producing section. Very many railroads have been built in that section for no purpose except to develop the timber industry. Men owning large tracts of timber land remote from railroads have built railroads into those tracts of land for the purpose of being able to market the timber. After they have built the railroads, while they are engaged primarily and principally in the transportation of timber which they themselves cut, they also take some business from the public in the way of carrying of passengers and freight and however minor it may be compared with the main business of carrying the timber, it constitutes them as common carriers."

There followed a colloquy as set forth below:[16]

MR. FORAKER. "I call the Senator's attention to the fact that when the Chesapeake and Ohio Railroad was incorporated, as stated by the Supreme Court decision to which the Senator has referred, there was no law of the State of Virginia prohibiting it from engaging in contracts of this kind. After that the State passed a law in 1895 prohibiting it, before this contract was entered into, and that cut a very important figure in the decision of the court."

MR. LACON. "But, if the Senator from Ohio will pardon me, if I have not incorrectly understood the decision, the main point in the case, as I gather it, is that the Chesapeake and Ohio Railroad Company bought coal and agreed to deliver it to the New York and New Haven Railroad Company at a price which did not represent the cost of the coal and the transportation of the coal at the published rates of transportation, and that therefore the conclusion was irresistible, as stated by the court, that they had undertaken this transaction with a view to the transportation of the coal at less rates than they were charging to the general public, and at less rates than the published rates for transportation, and therefore it was a violation of the interstate-commerce law. It would have been a violation of interstate-commerce law, even conceding that the company did have the

[16] 40 Cong. Rec. 6500 (1906).

authority under its charter to engage in the business of buying and selling coal. That is a great question with which we have to deal."

* * * * *

MR. DOLLIVER. "Mr. President, the Senator from West Virginia has introduced a very important practical question, probably a more far-reaching and difficult question than any with which the pending bill undertakes to deal.

* * * * *

No more difficult railway proposition exists than this connection of the carriers with the productive enterprises of the country. That relation is in all forms. Some railroads own coal mines and undertake to engage in the distribution of coal, and curiously enough some coal mines own railroads, because it has become a favorite method in these days in organizing a coal corporation to anticipate in a way the probable attitude of Congress, and the public dreads a mixture of the two functions. So it is not uncommon to find great coal corporations having as a part of their charter rights the right to build and operate railroads."

Senator LODGE concluded consideration of the subject for that day with the observation:[17]

"Mr. President, I think it is fairly demonstrated that there is a good deal of confusion in regard to these amendments.

* * * * *

The ownership by the railroad companies of these great properties which comprise the necessities of life is an admitted evil. The attitude of the Supreme Court in the Chesapeake and Ohio case recognizes such ownership as contrary to sound public policy. It is idle to say that we are unable to deal with it or to stop it. If we are to be paralyzed in dealing with such an evil as this, then the interstate-commerce clause in the Constitution is utterly vain."

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[17] 40 Cong. Rec. 6509 (1906).

When consideration of the subject was resumed on the following day, May 9, 1906, Senator McLAURIN asked that his amendment [18] be withdrawn, and then, in lieu of the amendment proposed by Senator ELKINS, he offered the following amendment: [19]

> "From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or District of the United States to any other State, Territory, or District of the United States or to any foreign country any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier."

Thereupon, Senator McLAURIN, to save a point of order, withdrew his amendment to allow a vote to be taken on the amendment offered by Senator Elkins.[20] Then Senator ELKINS modified his previously-proposed amendment to read: [21]

> "From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier."

Senator CULBERSON stated the evil to be eradicated, and the problem of doing it, in these words: [22]

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[18] See pages 61-62, *supra*.
[19] 40 Cong. Rec. 6559 (1906).
[20] 40 Cong. Rec. 6559 (1906).
[21] 40 Cong. Rec. 6561 (1906).
[22] 40 Cong. Rec. 6562 (1906).

"Mr. President, the chief evil which we desire to eradicate in this matter is the ownership of coal mines by railroad companies engaged in interstate commerce. A great many Senators believe that an absolute prohibition against the ownership, production and manufacture of coal by such corporations can not be legitimately made by the Congress of the United States. Without going into that question—and as to its general effect I agree—the question before the Senate is, How, if at all, we may reach that evil without undertaking to prohibit such ownership and production absolutely? That is the point—not to prohibit these companies from carrying coal from one State to another necessarily, because that will not reach the evil. The evil is the ownership and the production by the corporations themselves aside from their legitimate business of transportation."

Senator CARTER, of Montana, had, on a previous occasion, expressed grave doubt as to the propriety of engaging in departures from the main purpose of the pending Hepburn bill. But, at this point in the debate, he took occasion to explain the necessity for industries building, owning and operating industrial railroads. Senator CARTER said:[28]

"We have one enterprise in the State of Montana in which there are to-day over 20,000 men engaged at good wages in the production of copper. It constitutes the great industrial enterprise of our State. This copper is produced 20 miles from the mines. The mines are chiefly in and about the city of Butte. The largest copper smelter in the world is located at Anaconda, some twenty-odd miles distant. For many years the great mining companies undertook to have their ores transported from Butte to Anaconda through the agency of an independent railroad company.

They found the rolling stock inadequate; the cars were not suited to the purpose; the service was fitful

[28] 40 Cong. Rec. 6564 (1906).

and uncertain, and rates were often prohibitive.

In order that this work might proceed, the copper companies on their own account built a railroad from the copper mines to the copper smelter, a distance of 20 miles. In actual operation this intervening piece of track between the mine and the smelter is as essential to the operation of the general business as the tracks within the levels themselves, upon which run the small cars filled with ore.

This railroad, running from Butte to Anaconda, was constructed principally to carry the copper ore from the mine to the smelter. Incidentally passengers are carried over it also. The Great Northern uses that track for 20 miles, because Anaconda is the terminal of the Great Northern passenger trains which reach there from St. Paul and Puget Sound. It is therefore partly engaged in interstate commerce. The supplies shipped in to the citizens of Anaconda are billed from Philadelphia, New York, and Chicago over this road to Anaconda, and whatsoever the body of the people have to ship out from the town of Anaconda must be shipped over this road, and billed to distant points in the country. The coal needed to run the smelter at Anaconda is shipped from Wyoming very largely, and to a considerable extent the coke is shipped from British Columbia, and to a considerable degree from Connellsville, in the State of Pennsylvania.

Therefore this line of road, only 20 miles in length, primarily constructed to haul ore, splendidly equipped, with a magnificent roadbed, 90-pound steel rails, ponderous locomotives, equipment unexcelled in any part of the country for a road of like length, is engaged in interstate commerce.

Now, what would be the effect of the amendment of the Senator from West Virginia? This company would be compelled to dismember itself. The effect would be to disrupt and disorganize and devitalize the best and largest industry and enterprise in that State. The enterprise can not be successfully conducted without the railroad, and the railroad can not be operated successfully by an outside company.

"* * * The chief purpose of the amendment is to cure an evil which has become well known to the country at large—the control of coal by the railroads in the anthracite region in Pennsylvania. That is the main purpose of the amendment. Of course the evil extends to West Virginia and contiguous territory. But therein rests the point to which most of the discussion is directed, and that is the evil sought to be corrected. It will require the best thought of the Interstate Commerce Committee to apply a general law to that existing evil and at the same time avoid touching a vital point in the industrial life of the country in many other sections."

Senator CLARK, of Montana, then complemented and supplemented what Senator CARTER had said. Senator CLARK said:[24]

"There is another feature of this question which I want to present to the Senate. All over that western part of this continent, as has been shown by the development of a half century, discoveries of great mines have been made and are still being made everywhere. In many instances mines are found containing base metals, lead and copper, at points many miles away from any railroad. Persons who own those mines of base metals can not work them unless they have railroad facilities. Butte was kept back for fifteen years for want of railroad facilities, and I know of a number of instances where mines have been discovered and developed and found to be big mines, but being owned by individuals or perhaps by a single company there was no railroad company that would undertake to build a line to them for the reason that it would be hazardous, as they might shut down the mines at any time. What was the result? The owners of the mines—the individuals or the company, as the case might be—have been obliged to build a branch road themselves to the nearest road, in order to secure access to the markets of the world for the products of their mines.

[24] 40 Cong. Rec. 6565 (1906).

There is an instance of this kind in southern Arizona. The Copper Queen Mining Company is owned by Phelps, Dodge & Co., and they have a number of the greatest mines in that wonderful Territory. They were obliged for their own protection to build a road about 200 miles in length, and to-day it is in operation. * * * Now, what are you going to do under this amendment with such a proposition as that? I myself was obliged to build a road shorter than that—but 28 miles in length—before I could get the products of a copper mine to the market. When I completed that road, some fifteen years ago, it became an interstate-commerce road, because all the products went out and supplies came in through other States and Territories."

Senator TELLER said:[35]

"The case decided by the Supreme Court in February last was decided under the existing law, and it would appear from an examination of that case that there is ample law to deal with this subject. What I want to call the attention of the Senate to is simply that the complaint there was with reference to the transportation of coal. The Senator from West Virginia [MR. ELKINS] who has introduced this subject is making his complaint simply because of the unfair treatment of the coal dealers of that State. The Senator from Montana who first spoke [MR. CARTER] has told us something of the difficulty of dealing with this question, and so has the Senator from Montana [MR. CLARK] who spoke last. With some knowledge of the condition not only in Montana, but in Arizona, what both Senators have presented here satisfies me that there is danger of this legislation going very much beyond the point we ought to go. We are very liable to do more harm than good. If we could confine it entirely to the coal business for the time being, I think perhaps it would be better than to include all commodities and all kinds of service."

Senator FULTON said:[36]

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[35] 40 Cong. Rec. 6565-6566 (1906).
[36] 40 Cong. Rec. 6566-6567 (1906).

"All over the West, as the Senator from Colorado [MR. TELLER] has said, there are little railroads which have been built to connect with coal mines and sawmills, that have been built simply to get the product from the mills and the mines. In such cases mining and milling are the principal enterprises. The railroading is merely incidental thereto, and yet those railroads connect with interstate lines, or with other railroads connecting with transcontinental or interstate lines. Hence these small roads doubtless would be held to be engaged in interstate commerce. It seems to me, Mr. President, that a distinction should be made and that proper exceptions should be provided in any legislation that shall be enacted on this subject in order to protect such enterprises. Just what those exceptions should be and just how they should be framed I am not prepared at this moment to say, and it does not seem to me that any other Senator is prepared to say."

Then, Senator TILLMAN said:[27]

"• • • We all know there are grave abuses and outrageous conditions not only in West Virginia, but in Pennsylvania, in East Tennessee, in the Indian Territory, and I do not know where else. I will read, for the information of the Senate, what very few Senators have ever read since I introduced my report here, some observations I made on this very topic in the brief report which I presented."[28]

Senator BAILEY said:[29]

"If the Senator will allow us to vote on the original proposition, as corrected in accordance with my suggestion, and that is voted down, then the Senator from Mississippi has a proposition, and we will vote on it, and I believe we can do it all without debate."

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[27] 40 Cong. Rec. 6567-6568 (1906).

[28] Senator Tillman here read from his report as printed herein, *supra*, pp. 45-48. It is not here repeated.

[29] 40 Cong. Rec. 6568 (1906).

Senator ELKINS then proposed the following substitute for his earlier amendment:[30]

> "From and after May 1, 1908, it shall be unlawful any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier."

Senator BACON immediately called attention to the fact that the amendment as just presented would not prevent railroads from owning coal mines or continuing to transport the coal from company-owned mines so long as that transportation is limited to the particular State in which the coal mines are located and the railroad is situated. Senator BACON said:[31]

> Mr. President, I wish to say a word. I do not think the amendment will be effective. The evil sought to be remedied, as I understand, is that railroad companies own coal mines and monopolize the production and the carriage of this property. **The substitute does not in any manner prevent their continuing to own the coal mines or continuing to transport the coal, so long as that transportation is limited to the particular State in which the coal mines are located and the railroad is situated.** [Heavy type supplied.]

The amendment as thus proposed by Senator Elkins was agreed to.[32]

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[30] 40 Cong. Rec. 6568 (1906).
[31] 40 Cong. Rec. 6568, (1906).
[32] 40 Cong. Rec. 6570 (1906).

On May 11, 1906, Senator LAFOLLETTE offered the following amendment:[33]

> "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.
>
> The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this act."

The Senator said:[34]

> "I did neglect to state that this section clothes the Commission with power to make an order upon an investigation which has originated with the Commission. Section 13 of the bill as reported by the committee leaves with the Commission authority to make an investigation upon its own motion, but section 15 does not empower the Commission to make the order to correct a wrong which it may discover upon an investigation under section 13.
>
> Now, section 15, which I propose as a substitute corrects that obvious defect in the pending bill. That is the only difference with reference to this particular point. It is manifestly absurd to allow the Commission to make an investigation on its own motion under section 13 and then withhold from it all authority to issue an order to remedy the defect or evil which the investigation has disclosed."

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[33] 40 Cong. Rec. 6697 (1906).
[34] 40 Cong. Rec. 6697 (1906).

The Amendment offered by Senator LaFollette in the nature of a substitute for the Elkins amendment was rejected.[35]

On May 17, 1906, the following paragraph was inserted in the bill, at page 5, beginning with line 25, as in Committee of the Whole:[36]

> "From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States or to any foreign country any article or commodity manufacured, mined, or produced by it or under its authority or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier."

When the foregoing paragraph had been inserted in the bill as in Committee of the Whole, Senator TILLMAN said:[37]

> Mr. President, I regard this as one of the most far-reaching and important amendments that it is proposed to incorporate in the bill now under consideration. The words in the bill that have just been read are a substitute for the original amendment proposed by the Senator from West Virginia [Mr. ELKINS.]
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> • • • •
>
> I further stated that there were two important amendments which I wished to see incorporated in the bill. One of these was the idea embraced in this amendment to wit, the divorce of the business of transportation from the business of production—to make a public carrier a public carrier and nothing else.
>
> The other was a provision to compel interstate-commerce roads to give connections by means of switches or other appliances, so these little branch lines could

[35] 40 Cong. Rec. 6700 (1906).
[36] 40 Cong. Rec. 7011 (1906).
[37] 40 Cong. Rec. 7011-7012 (1906).

gain access to the markets. That idea had been discussed and pressed with great earnestness by the Senator from West Virginia in committee, and I am perfectly willing that he should claim the paternity of it. But, so far as this other proposition is concerned, I think it never would have received the attention it has in the eyes of the people of the country and that the Senator from West Virginia himself never gave it the serious consideration which he afterwards did until I presented to this body the memorial of the Red Rock Fuel Company, pointing out the iniquities and outrages perpetrated on that corporation by the Baltimore and Ohio, and also followed, as it was, by the letter from the governor of West Virginia, Mr. Dawson, proclaiming the fact that the State of West Virginia was absolutely at the mercy of the three railroad systems entering it, so far as getting to market was concerned.

Then Senators will recall that day after day for a week or more every morning I presented in this Chamber and had read letter after letter from various coal producers, pointing out the absolute helplessness of the independent operators because of the fact that the Pennsylvania road and the Baltimore and Ohio road and the Chesapeake and Ohio road and the Norfolk and Western road absolutely dominated the bituminous and the anthracite coal fields of the two States of Pennsylvania and West Virginia, and that their property was being confiscated. So much for the genesis of this proposition.

But my attention has been called to the fact that the amendment that is incorporated in the bill as it stands, which it is proposed to concur in, does not cure the evil.

I have here a communication from a gentleman engaged in coal production, and he points out that this amendment would not prevent the ownership of coal properties by the ownership of stock in coal companies; that it would not prevent the control of coal companies by officials of railway companies; that is would not touch the ownership of railroads by coal companies or the common ownership of railroad companies and coal companies. Here is a letter prepared by an Inde-

pendent coal operator, in which the scheme by which this amendment can be evaded is elaborated and pointed out in detail. I have not time to read it, but I ask to have incorporated in my remarks.

* * * * *

Mr. President, there are differences of opinion among able lawyers whom I have consulted, and I have before remarked in the Senate that this question is so perplexing and has so many ramifications and there are so many complex conditions, so many methods of evasion, that it is difficult, without a long and well-guarded enactment, to accomplish what we are trying to do without overdoing it and perpetrating great injury and wrong in certain instances. I have prepared what appears to me to be a much stronger and more efficacious provision, which I send to the desk and ask to have read as a substitute for the pending amendment.

The amendment which Senator TILLMAN proposed in lieu of the amendment agreed to as in Committee of the Whole was as follows:[38]

After May 1, 1908, it shall be unlawful for any common carrier to engage in the transportation of interstate commerce, if such common carrier shall at the time be interested, directly or indirectly, by stock ownership or otherwise, in the article or property which is the subject-matter of such commerce, or if it be interested in the time, directly or indirectly, by stock ownership or otherwise, in the mines or factories producing such commerce; or if at the time any officer, director, agent, or employee of such common carrier be interested, directly, or indirectly, by stock ownership or otherwise, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same; or if at the time stockholders owning more than 10 per cent of the capital stock of such com-

[38] 40 Cong. Rec. 7012 (1906).

mon carrier be interested, directly or indirectly, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same.

This section shall not prevent a common carrier from mining coal or carrying articles or property for its own use or for the use of its officers, directors, agents, employees, or stockholders.

The amendment offered by Senator TILLMAN was rejected.[39]

Following the rejection of the substitute amendment proposed by Senator TILLMAN, Senator PILES said:[40]

Mr. President, I know, for instance, in my own home city, in the early history of that country the people turned out en masse for the purpose of constructing, or aiding in the construction, of a little line of railroad —which is now some 38 miles in length—to the coal mines, in order that they might have some product to send to market and get ready money into that new country. That road exists to-day, and to my personal knowledge its stock is, or was, owned by another transportation company. It is run in connection with a steamship line, and it carries freight and passengers for hire for the people living along the line of the road. But the transportation of outside freight is a mere incident to its business. The principal business of that road is to carry the coal mined by its stockholders up the mountains down to the city of Seattle, and there it is transported by steamers to California and other domestic ports, where it is sold. That steamship line is indirectly, at least, interested in that railroad. Is it the intention of Congress to put that railroad out of business? Is it the intention of Congress to put that steamship line out of business? I think not.

Mr. President, that is but one incident. Many more might be cited. That road is doing nobody any injury.

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[39] 40 Cong. Rec. 7012 (1906).

[40] 40 Cong. Rec. 7012-7013 (1906).

It and the mines which it reaches employ hundreds of men in a great and beneficial industry. The steamship line operated in connection with it is engaged in building a great commerce. Shall this railway company, this steamship company, and other companies conducting great industries on similar lines be put out of business? That is exactly what will be done if the amendment of the Senator from South Carolina is adopted, because it provides, in effect, that the steamship line shall not own any stock in the railroad company, and the railroad company shall own no stock in the steamship line, and if such ownership shall exist it will be unlawful for the steamship company to transport from the State of Washington to the State of California, for instance, the coal carried by the railroad company to the city of Seattle for transshipment.

But let me go one step further, Mr. President. In the development of the great Pacific Northwestern country we have opened up the most magnificent forests in the world. We have done it by building great logging railroads into the forests. We are not logging in that country with horses and wagons or oxen. We are logging by means of railroads. Those railroads, running from 5 to 40 or 50 miles back into the forests, necessarily penetrate the valleys. People to a certain extent have settled in those valleys and have builded for themselves homes. Their little freight, as a matter of accommodation more than anything else, and some passengers, are carried by the logging railroads. Those logging roads own sawmills on tide water, or the mill companies own the logging roads. The roads take the timber to the sawmills, where it is sawed into lumber. The mill companies own their own schooners, both steam and sail. When the timber is sawed into lumber it is transported on these schooners to all parts of the maritime world.

If, then, these little logging roads can not own stock in the sawmills, or the mill companies can not own stock in the logging roads or own such roads outright, the great lumber industry, which employs in the woods 30,000 men alone, and which employes in the woods and in the mills and in the various industries connected

with the manufacture of lumber in the State of Washington alone upward of a hundred thousand men, and has an annual pay roll of something like $60,000,000, will be seriously retarded if not wholly destroyed.

Mr. President, I think it is time for Congress to call a halt. We came here to enact legislation upon this great question which would be beneficial to the people. The people of this country have had one object in view, if I understand them aright, and that is to create some tribunal before which they can appear and submit their grievances. Every man in this country has a right to go into court and complain of any man who does him an injury, or with respect to whom he assumes that he has a grievance. The shippers of this country came to the conclusion that they were entitled to have some forum before which they could present their grievances with reference to the railway in this country. And finding they had none, except that afforded by the common law, which was worse than nothing, they wanted Congress to enact a rate law, and that was all they wanted in this bill, in my judgment. They did not want Congress to indict the great industries of this country. They did not want Congress to stifle the energies and the industry of man; and I protest in the name of the great Pacific Northwest against the injustice that is about to be inflicted upon those people, and I hope the Senate will not permit the amendment to prevail.

Thereupon the following colloquy occurred:[41]

Mr. McLaurin. Before the Senator from Washington takes his seat, I should like to ask him a question.

Mr. Piles. Certainly.

Mr. McLaurin. If the words I shall read were inserted after the word "carrier," in line 1, page 6, would they not meet the objection of the Senator from Washington?

whose principal business is common carrying.

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[41] 40 Cong. Rec. 7018 (1906).

It seems to be the desire of the Senate to prohibit common carriers, whose principal business is common carrying, from engaging in the business of mining, but not to prohibit producers from providing their own means of transportation for their freight when they make the transportation business incidental to their main business. It seems to me if the words "whose principal business is common carrying" were inserted just after the word "carrier," in line 1, page 6, it would meet the objection of the Senator from Washington.

Mr. PILES. "Whose principal business is that of an interstate-commerce carrier." Is that what I understand the Senator to say?

Mr. MCLAURIN. The words I would suggest are "whose principal business is common carrying."

Mr. PILES: I think that would greatly benefit the amendment as it now stands; it would make it a great deal better; but I want to insert the word "interstate" —"whose principal business is that of an interstate carrier." But I think that this amendment should be defeated altogether. It is too large a question to be dealt with in this way. In my judgment too much mischief may be done by the enactment of this proposed law at the present time.

Mr. ELKINS. Mr. President, the purpose of this amendment, which was adopted by such a large majority when the bill was under discussion in Committee of the Whole, is to make a start toward divorcing production and transportation. I think the amendment is drawn as mildly as it can be and accomplish anything.

The Senator from Washington [Mr. PILES] makes an appeal here that logging roads in this State shall be excepted, or that, on account of their being handicapped so much by this amendment, it should not go into the law. If I understand the Senator's position, and if these logging roads are owned by lumber companies and incidental to their business, the law would not apply to them; or, if I understand, if these are intrastate logging roads or private roads they do not

come under the operatoon of the law, nor are they interstate carriers.

Mr. PILES. Will the Senator pardon me for a moment?

Mr. ELKINS. Certainly.

Mr. PILES. It is provided that this bill shall be applicable to carriers partly by rail and partly by water. I have endeavored to demonstrate that these logging roads are carrying partly by rail and partly by water, and it is not only interstate, but it is foreign commerce.

Mr. ELKINS. Which company owns—the steamship company, the lumber, or the railroad company?

Mr. PILES. One company owns the logging road and the sawmill and the steam schooners.

Mr. ELKINS. Which owns?

Mr. PILES. One company.

Mr. ELKINS. Which is the owning company?

Mr. PILES. I do not recall. In some cases it may be the lumber company, and in others it may be the railway company.

Mr. ELKINS. That is the very thing which produces the confusion here. If the lumber company owns this little line of railroad, 20 or 30 miles long, as an incident to its business, then this proposed law does not apply.

The record then shows the following:[42]

The PRESIDENT pro tempore. The yeas and nays have been demanded on the amendment proposed by the Senator from South Carolina [Mr. TILLMAN], and the secretary will call the roll.

The yeas and nays were ordered.

Mr. FLINT. I understand that the amendment offered by the Senator from Washington is accepted by the Senator from South Carolina?

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[42] 40 Cong. Rec. 7014-7016 (1906).

Mr. TILLMAN. I have no right to accept.

The PRESIDENT pro tempore. It is to an entirely different part of the section from that to which the amendment of the Senator from South Carolina is offered.

Mr. TILLMAN. I ask that my amendment may be read.

The PRESIDENT pro tempore. The amendment will be read.

The SECRETARY. On page 6 of the bill, line 7, after the word "indirect" insert "by partnership, stock ownership, or by any arrangement whatsoever."

* * * * *

So Mr. TILLMAN's amendment was rejected.

* * * * *

The PRESIDENT pro tempore. The next amendment made as in Committee of the Whole is at the bottom of page 5, which the Secretary will read.

The Secretary read as follows:

From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, district of the United States or to any foreign country any article or commodity manufactured, mined, or produced by it or under its authority or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier.

Mr. PILES. Mr. President, I move that the amendment be amended by inserting after the word "commodity," in line 4, on page 6, the words "other than timber and the manufactured products thereof."

The PRESIDENT pro tempore. The amendment proposed by the Senator from Washington will be stated.

The SECRETARY. On page 6, in line 4, after the word "commodity," it is proposed to insert "other than timber and the manufactured products thereof."

The PRESIDENT pro tempore. The question is on the amendment proposed by the Senator from Washington to the amendment made as in Committee of the Whole. [putting the question.] The ayes have it; and the amendment to the amendment is agreed to.

* * * * *

Mr. CLAY. I am sure the Senator from West Virginia will accept the amendment which I now offer, as the words I propose were in the amendment as it was originally drawn. In line 8, on page 6, after the word "necessary," I move to strike out the words "or used in" and insert "and intended for its own use."

Mr. ELKINS. I accept the amendment.

The PRESIDENT pro tempore. The Senator from West Virginia can not accept the amendment. The amendment must be acted on by the Senate. The amendment to the amendment will be stated.

The SECRETARY. On page 6, line 8, it is proposed to strike out the words "or used in" and to insert "and intended for its own use."

The PRESIDENT pro tempore. The question is on the amendment to the amendment.

The amendment to the amendment was agreed to.

On the following day, May 18, 1906, the bill was passed.[43] It was sent to conference on May 25, 1906, pursuant to House Resolution 534, and by the action of the House in

[43] 40 Cong. Rec. 7088 (1906).
[44] 40 Cong. Rec. 7428 (1906).
[45] 40 Cong. Rec. 7434 (1906).

adopting this resolution.[44]. The Speaker of the House appointed the following conferees: Mr. Hepburn, Mr. Sherman, and Mr. Richardson, of Alabama.[45] On May 28, 1906, the Senate consented to the conference requested by the House, and the Vice President appointed Senators Tillman, Elkins and Cullom as the conferees on the part of the Senate.[46]

The first report of the Conference Committee was printed as Senate Document No. 476, 59th Congress, First Session, and as House Report No. 4659, 59th Congress, First Session, being dated June 2, 1906.

With respect to the Commodities Clause, the Conference Report said:

> [2] Amendment numbered 6;
>
> That the House recede from its disagreement to the amendment of the Senate numbered 6, and agree to the same with an amendment as follows:
>
> In line 2 strike out "shall promptly."
>
> In line 2, after "of," insert *any lateral, branch line of railroad, or of.*
>
> In line 3, after "transportation," insert *shall.*
>
> In line 5, after "any," insert *such lateral, branch line of railroad, or.*
>
> And the Senate agree to the same.

In the "Statement of Managers on Part of the House," the Conference Report said:

> "[5] Amendment No. 5 as it passed the Senate prohibited any common carrier, after May 1, 1908, from transporting its own commodity, making an exception of timber and the manufactured products thereof. As agreed to in conference, this exception is eliminated, so

[44] 40 Cong. Rec. 7528-7529 (1906).

that the amendment as now agreed to prevents the carrier from carrying its own commodity, without exception.

Amendment No. 6 made provision for the compulsory installation of switch connections with rail where application was made therefor and [6] the Interstate Commerce Commission deemed the installation sufficiently important to warrant the same, the installation to be done at the expense of the applicant. As agreed to in conference, the amendment is broadened so as to require the compulsory installation of a connecting switch, not merely with a present or prospective shipper, but with any lateral or branch line of railroad.

The Conference Report not being agreed to, the bill was returned to conference, and a new Conference Report submitted on June 23, 1906, as House Report No. 5003, 59th Congress, First Session.

With respect to amendments numbered 5 and 6, that Report said:

[2] Amendment numbered 5:

That the House recede from its disagreement to the amendment of the Senate numbered 5, and agree to the same with an amendment as follows:

In line 2 strike out "common carrier" and insert *railroad*.

* * * * *

And the Senate agree to the same.

Amendment numbered 6:

That the House recede from its disagreement to the amendment of the Senate numbered 6, and agree to the same with an amendment as follows:

In line 2 strike out "shall promptly".

In line 2, after "of", insert *any lateral, branch line of railroad, or of*.

In line 3, after "transportation", insert *shall*.

In line 5, after "any", insert *such lateral, branch line of railroad, or*.

And the Senate agree to the same.

The Statement of Managers on the Part of the House, as contained in that report said:

> "[4] Amendment No. 5, as passed by the Senate, provided that after May 1, 1908, no common carrier could transport any commodity produced by itself, except from the provisions "timber, and the manufactured products thereof." As agreed to in conference the words "common carrier" are stricken out and the word "railroad" is substituted in lieu thereof.
>
> Amendment No. 6 made provision for the compulsory installation of switch connections with rail where application was made therefor and the Interstate Commerce Commission deemed the installation sufficiently important to warrant the same, the installation to be done at the expense of the applicant. As agreed to in conference, the amendment is broadened so as to require the compulsory installation of a connecting switch, not merely with a present or prospective shipper, but with any lateral or branch line of railroad."

When this Conference Report was called up for consideration by the Senate, on June 26, 1906, the following statements were made:[47]

> Mr. TILLMAN. I ask the Senate to proceed to the consideration of the conference report on the railroad rate bill.
>
> The Senate resumed the consideration of the report of the committee of conference on the disagreeing votes of the two Houses on the bill (H. R. 12987) to amend an act entitled "An act to regulate commerce," approved February 4, 1887, and all acts amendatory

[47] 40 Cong. Rec. 9250 (1906).

thereof, and to enlarge the powers of the Interstate Commerce Commission.

"Mr. ELKINS. Mr. President, in view of the fact that there is a great desire on the part of Senators to vote on the conference report and possibly return it to the committee of conference, I will not detain the Senate long.

"The cause of difference about substituting the word "railroad" for "common carrier" in amendment 5 of the conference report grows out of the amendment that I introduced, having for its purpose to divorce transportation from production on the part of the railroads engaged in transporting coal they mined and sold in competition with their shippers, which was a great abuse. Of late the railroads in West Virginia and in other States have acquired large holdings of coal lands and become extensive miners of coal as well as shippers, and in competition with shippers on their lines. This abuse grew into a grievous wrong to independent shippers. I sought to correct this abuse by an amendment confining railroads to their legitimate business of transporting freight and passengers and prohibiting them from engaging in the transportation of any commodity which they might own except for their own use.

In the adoption of this amendment and the discussion of it the wording was changed, and "common carrier" was substituted in place of "railroads," with the limitation that I have just stated of not allowing a common carrier to transport its own products. This produced the confusion that a pipe line is not permitted to transport its own products. West Virginia is probably the largest oil-producing State in the Union. I believe the sale of oil averages $50,000 per day in West Virginia. It is a very large income to our people. So far as I know, there has never been a complaint of any kind by anybody against pipe lines. The fact is, the pipe lines purchase all or nearly all the oil produced in West Virginia and transport it as their own oil, the Standard Oil being the largest pipe-line company in the State. So far as I am advised, none

of the pipe lines condemned the right of way or exercised the right of eminent domain in building their pipe-line stations—"pumping stations," as they call them."

The bill was again returned to conference, and a final Conference Report submitted on June 28, 1906, printed as House Report No. 5076, 59th Congress, First Session. As to amendments numbered 5 and 6, this report said:

[2] Amendment numbered 5:

That the House recede from its disagreement to the amendment of the Senate numbered 5, and agree to the same with an amendment as follows:

In line 2 strike out "common carriers" and insert *railroad company.*

Amendment numbered 6:

That the House recede from its disagrement to the amendment of the Senate numbered 6, and agree to the same with an amendment as follows:

In line 2 strike out "shall promptly".

In line 2, after "of", insert *any lateral, branch line of railroad, or of.*

In line 3, after "transportation", insert *shall.*

In line 5, after "any", insert *such lateral, branch line of railroad, or.*

And the Senate agree to the same.

The Statement of Managers on part of the House, as contained in this Conference Report, said:

"Amendment No. 5 as passed by the Senate provided that after May 1, 1908, no common carrier should transport any commodity produced by itself excepting from such prohibition timber and the manufactured products thereof. As agreed to in conference

the words "common carrier" are stricken out, and the words "railroad company" substituted in lieu thereof.

"Amendment No. 6 made provision for the compulsory installation of switch connections with rail where application was made therefor and the Interstate Commerce Commission deemed the installation sufficiently important to warrant the same, the installation to be done at the expense of the applicant. As agreed to in conference, the amendment is broadened so as to require the compulsory installation of a connecting switch, not merely with a present or prospective shipper, but with any lateral or branch line of railroad."

On June 28, 1906, when the Conference Report was again called up for consideration by the Senate, Senator TILLMAN said:[48]

"At the last conference the only thing considered was the pass amendment, and what is known as the "commodity amendment," and the other matters are the same as we reported at the preceding conference. The bill as it will become a law is in print, and Senators who want to examine it can do so by getting copies.

"Mr. President, the commodity amendment has been modified by inserting the word "company;" so that it reads:

"From and after May 1, 1908, it shall be unlawful for any railroad company to transport from any State, Territory, etc.

"The Senate amendment made it unlawful for any common carrier to transport, etc. The effect of this change from "common carrier" to "railroad" and now to "railroad company" is easily understood, and I shall not say much about it. The words "common carrier" embraced pipe lines. The words "railroad companies," of course, leave those out. The prohibition against the transportation by any common carrier or anything produced by it is now limited to railroad companies. It was a disagreement, and yet not a dis-

[48] 40 Cong. Rec. 9641 (1906).

agreement, but it was an effort on my part to hold on to the Senate provision and not to submit to the contention of the House conferees that the words "common carrier" should be stricken out and the word "railroad" inserted, and that caused me to refuse to sign the last report. I have not signed this one for the same reason, because, as I said the other day, I felt that the influences behind this change were sinister, and that the large number of telegrams, I will not say all of them, but a large proportion of them, had been sent here through the instrumentality and at the instance of the Standard Oil Company."

The Commodities Clause, as thus agreed to in conference, was adopted by both Houses of the Congress, by reason of the final adoption of the report of the Conference Committee.[49] The bill was signed by the President on June 29, 1906.[50]

[49] 40 Cong. Rec. 9655 (1906).
[50] 40 Cong. Rec. 9807 (1906).

PROPOSALS TO AMEND COMMODITIES CLAUSE DURING CONSIDERATION OF MANN-ELKINS ACT OF 1910

When H. R. 17536, Sixty-First Congress, Second Session, which eventuated into the Mann-Elkins Act of June 18, 1910,[1] was under consideration by Congress, several proposals for the amendment of the Commodities Clause were offered.

Mr. CRUMPACKER, on April 29, 1910, offered the following amendment, which was rejected:[2]

> "After the word "indirect," line 1, page 51, insert "or any such article or commodity manufactured, mined, owned, or produced by or under the authority of any company, association, or corporation in which such railroad company, either directly or indirectly, owns or holds any stock or other right or interest."

On the same day Mr. WANGER offered the following amendment which was rejected:[3]

> "Amend by striking out the paragraph beginning with line 18, on page 50, and insert the following:
>
> "From and after May 1, 1908, it shall be unlawful for any railroad company to transport from one State, Territory, or district of the United States, to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, or after May 1, 1912, (*a*) owned in whole or in part by any corporation (which corporation may be referred to as a 'holding company') owning at

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[1] Act of June 18, 1910, 36 Stat. L. 539 (1910).
[2] 45 Cong. Rec. 5590-5591 (1910).
[3] 45 Cong. Rec. 5594-5595 (1910).

the time of such transportation one-half or more of the capital stock of such railroad company or having any other form of ownership of such railroad company, or (*b*) owned in whole or in part by any corporation one-fifth or more of whose capital stock is at the time of such transportation owned by a corporation (which may be referred to as a 'holding company'), which also owns one-third or more of the issued capital stock of such railroad company, or has any other ownership of such railroad company, or (*c*) owned in whole or in part by any corporation one-half or more of whose capital stock is at the time of such transportation owned by a corporation (which may be referred to as a 'holding company') which also owns one-fifth or more of the issued capital stock of such railroad company, or in which article or commodity any of said corporations at the time of such transportation may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for the use of such railroad company in the conduct of its business as a common carrier.

"From and after May 1, 1912, a railroad company owning any capital stock, or having any other form of ownership, in whole or in part, of any other corporation which manufactures, mines, produces, owns, or has any interest, direct or indirect, at the time of transportation, in any such articles or commodities, shall be deemed to have an interest in such articles or commodities within the meaning of this act.

"Any act or duty required to be done or performed by any provision of this section may be compelled by mandamus, and anything declared in any provision of this section to be unlawful may be prevented by injunction by any court of competent jurisdiction at the suit of the United States or of any citizen thereof."

When the bill was under consideration in the Senate, Senator BAILEY, on June 1, 1910, offered the following amendment, which was rejected:[4]

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[4] 45 Cong. Rec. 7207-7208, 7218 (1910).

"That the fifth paragraph of the first section of the act approved June 29, 1906, entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," be amended to read as follows:

From and after the 1st day of May, 1912, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity manufactured, mined, or produced by it, or under its authority, or by any corporation, joint stock company, or partnership in which said railroad holds, owns or controls, directly or indirectly, any stock or interest; and it shall also be unlawful from and after the 1st day of May, 1912, for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity which it may own, in whole or in part, or in which it may have an interest, direct or indirect, or which is owned in whole or in part by any corporation, joint stock company, or partnership in which the said railroad company holds, owns, or controls any stock or interest: *Provided, however,* That any railroad company may transport any such articles or commodities as may be necessary and intended for its own use in conducting its business as a common carrier.

On the following day, June 2, 1910, Senator CRAWFORD, of South Dakota, offered the following amendment, which was rejected:[3]

"From and after May 1, 1912, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity which

[3] 45 Cong. Rec. 7251-7252 (1910).

it owns in whole or in part, or in which it may have any interest, direct or indirect; or which is owned in whole or in part by a corporation in which it is the owner, legally or equitably, of the capital stock or any part thereof; or any article or commodity which at the time such article or commodity is presented to it for transportation, as aforesaid, was owned by it in whole or in part: *Provided*, That this act shall not apply to such articles or commodities as may be necessary and intended for the use of said railway company in the conduct of its business as a common carrier."

The only changes made in the language of the Commodities Clause, by the Mann-Elkins Act of 1910, were the removal of the comma after the word "whole" and the insertion of commas after the words "interest" and "direct." As earlier indicated, no change was made in the purpose and intent of the statute.[6]

[6] Act of June 18, 1910, 36 Stat. L. 547 §7 (1910).

REPORT OF ATTORNEY GENERAL—1910

In his Annual Report to Congress for the fiscal year ending June 30, 1910, dated December 10, 1910, the Attorney General said, with respect to the Commodities Clause that:[1]

MATTERS ARISING UNDER THE INTERSTATE-COMMERCE LAWS.

COMMODITIES-CLAUSE CASES.

"In deciding the appeals involving the construction of the clause in the Hepburn Act of 1906 (34 Stat. 584) making it unlawful for any railroad company to transport in interstate or foreign commerce any article or commodity (other than timber and its manufactures) manufactured, mined, or produced by it or under its authority, or owned by it in whole or in part, or in which it may have an interest, direct or indirect, except such commodities as may be necessary for use in its business, the Supreme Court held that this prohibition did not apply to the transportation by a carrier of commodities owned by another corporation, where the only interest which the carrier had therein at the time of such transportation arose out of its ownership of capital stock in a *bona fide* corporation owning the commodities so transported. The Department interpreted this decision as not necessarily determining the application of the statute to cases where the commodities transported are owned by a corporation, *all*, or substantially all, of whose stock is owned by the carrier corporation at the time of transportation, and especially where the carrier shall have transferred all of its interest in such commodities to a corporation formed for the express purpose of evading the prohibition of the commodities clause. When the mandates of the Supreme Court in

[1] Report of Attorney General, 1910, pp. 6-7.

these cases were filed in the circuit court, that court in two cases granted injunctions to the Government but dismissed the other case. In such other cases the Government sought leave to file an amended bill for the purpose of testing the application of the principle of these decisions to the case above referred to. The Circuit court denied the application, as well as a further motion that the cases be dismissed without prejudice, holding that the decision of the Supreme Court was conclusive against the Government on these points. An appeal was thereupon taken to the Supreme Court, where the cases will be argued in January, 1911.

As I pointed out in my last annual report, if the prohibition of the statute can be successfully evaded by the simple device of transfer of ownership of the property to a corporation, all of whose stock shall be owned or controlled by the carrier Congress should amend the statute so as to make it an effectual and not a merely illusory prohibition; or else repeal it."

PROPOSALS FOR AMENDMENT OF COMMODITIES CLAUSE SUBSEQUENT TO MANN-ELKINS ACT OF 1910 AND PRIOR TO TRANSPORTATION ACT OF 1940.

On June 18, 1910, the day the Mann-Elkins Act became law, Mr. HULL of Tennessee made this statement on the floor of the House:[1]

> "Mr. Speaker, during the last year, immediately after the Supreme Court of the United States rendered what is known as the "commodities-clause" decision, in which it refused to hold that feature of the Hepburn amendment to the interstate-commerce law constitutional and valid, but, in effect emasculated it, I drafted a bill in the nature of an amendment to the interstate-commerce law as originally enacted and from time to time amended, the purpose of which bill was to so frame the commodities clause as to fully and clearly raise and oblige the court to determine the constitutional questions involved and at the same time to secure an effective regulation and control of this class of our interstate commerce.
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> • • • •
>
> "The proposed amendment undertakes not only to divorce transportation from production, but also to divorce it from trading in any article or commodity prior to or during its interstate shipment, to the end that the producer and the consumer may have transportation by a disinterested carrier. The amendment prohibits the interstate shipment of any commodity that has been manufactured, mined, or procured by the interstate carrier or by any joint-stock company or corporation in which such interstate carrier owns or controls, directly or indirectly, any stock or interest; also, a railroad company is prohibited from tran. port-

[1] 45 Cong. Rec. 8479-8480 (1910).

ing in interstate commerce any commodity which it owns in whole or in part, or which it has owned in whole or in part, at any time subsequent to the passage of this act and since such article or commodity was manufactured, mined, or produced, or which is, or was, so owned by any joint-stock company or corporation in which the railroad company owns or controls any stock or interest; also, such carrier is prohibited from so transporting any commodity in which it has any interest, direct or indirect, or in which it has had any such interest at any time subsequent to the passage of this act and since such commodity was manufactured, mined, or produced, or in which any joint-stock company or corporation in which the railroad company owns or controls any stock or interest has, or has had, any such interest. I am frank to say that, if possible, one or two features of the bill I have offered should be somewhat liberalized, but thus far I have been unable to formulate suitable changes; however, it is my purpose to draft and offer, at some future time, such modification in the form of amendments as will fully accomplish the purposes of the present bill and at the same time work no injustice to the railroads to be affected in performing its provisions."

On the same day, Mr. HULL introduced a bill[2] to provide as follows:

A Bill

"To amend an Act approved June twenty-ninth, nineteen hundred and six, and entitled "An Act to amend an Act entitled 'An Act to regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission."

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

[2] H. R. 26983, 61st Cong., 2d Sess. (1910).

gress assembled, That section one, paragraph one, of an Act approved June twenty-ninth, nineteen hundred and six, and entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," be so amended as to read as follows:

"From and after July first, nineteen hundred and twelve, it shall be unlawful for any railroad company to transport from any State or Territory or the District of Columbia to any other State, Territory, or the District of Columbia, or to our insular possessions, or to any foreign country, any article or commodity other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or by any firm, joint stock company, or corporation in which it owns or controls, directly or indirectly, any stock or interest, or which it (the railroad company) may own in whole or in part, or which it has owned in whole or in part at any time subsequent to the passage of this Act and since such article or commodity was manufactured, mined, or produced, or in which it may have an interest, direct or indirect, or in which it has had an interest direct or indirect, at any time subsequent to the passage of this Act and since such article was manufactured, mined, or produced, or which is owned in whole or in part by any firm, joint stock company, or corporation in which it (the railroad company) owns or controls, directly or indirectly, any stock or interest, or which has been owned in whole or in part at any time subsequent to the passage of this Act and since such article or commodity was manufactured, mined, or produced, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The bill was referred to the Committee on Interstate and Foreign Commerce, and no action taken on it.

OPINION OF ATTORNEY GENERAL

Under date of November 29, 1912, Attorney General Wickersham gave the following opinion to the Secretary of the Interior:[3]

"Sir: I have your favor of 26th instant, in which you ask my opinion with respect to the legality of the transfer of certain coal-mining leases which you are asked to approve, and which embrace lands in the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations in the Indian Territory, now Oklahoma, from the Western Coal & Mining Co., (the present lessee under assignment with your approval, from the Atoka Coal & Mining Co., the original lessee), all of whose capital stock is owned by the Missouri Pacific Railway Co., to the Folsom Morris Coal Mining Co., a corporation, all of whose capital stock is owned by the Cherokee and Pittsburgh Coal & Mining Co., all of whose capital stock is in turn owned by the Atchison, Topeka & Santa Fe Railway Co. (excepting in each case directors' qualifying shares).

* * * *

"The specific inquiry arises out of the possible application to the case of the fifth paragraph of the first section of the act to regulate commerce, as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn act.

* * * * *

"The report in 220 U. S. gives in detail the allegations made in the amendment to the bill there tendered which the Supreme Court accepted as satisfactory *prima facie* proof of such identity. In the case which you have under consideration the determination whether or not the commodities clause as construed

[3] 29 Opinions of Attorney General, pp. 588-592 (1912).

by the Supreme Court in 220 U. S. would apply to the shipment of coal over the Atchison, Topeka & Santa Fe road by the proposed assignee of a lease, being a corporation all of whose stock it owns, must depend upon whether or not the railroad company uses the coal company merely as an artificial legal entity which it completely dominates and controls, operating the coal company as an integral part of its own business, the corporation being a mere artificial division of the work which is in effect carried on by the railroad company; or whether, although the owner of all its stock, the coal company is operated separately and distinct from the railroad, and is not used by it merely as a part of department of its general business, and is not in effect a mere device to escape the prohibition of the statute."

REPORT OF ATTORNEY GENERAL—1914

In his Annual Report to Congress for the fiscal year ended June 30, 1914, dated December 7, 1914, the Attorney General said, under the heading "Recommendations"[4]:

1. AMENDMENT OF COMMODITY CLAUSE OF INTERSTATE COMMERCE ACT.

"In *United States* v. *Delaware & Hudson Co.* (213 U. S., 366) the Supreme Court construed the commodities clause as prohibiting a railroad from transporting articles in which at the time of transportation it has any interest, direct or indirect, in a legal or equitable sense. It further held that a railroad does not necessarily have an interest, direct or indirect, in a legal or equitable sense, in articles manufactured or produced by a bona fide corporation of which the railroad is a stockholder. In a later case (*United States* v. *Lehigh Valley Railroad Co.*, 220 U. S., 257) the court held that if the corporation owning the articles transported by

[4] Report of Attorney General, 1914, pp. 5-6.

the railroad was so identified with the railroad as in fact to be but an arm of the railroad, then the railroad would have an interest in the articles in the sense of the statute. Under this construction it has been claimed that the statute is not violated unless the railroad has the required interest in the articles at the very time of transportation. Thinking to bring themselves within this construction of the act, the following plan has been devised:

"A railroad company engaged, say, in mining coal, either directly or indirectly through a controlled corporation which is but a part of itself, organizes a new corporation the stock of which is distributed ratably amongst the stockholders of the railroad and the management of which will be dominated by officers of the railroad company. Thereupon the railroad will sell to the new corporation at the mouth of the mines its production of coal under a contract which puts the new corporation largely, if not completely, within the power of the railroad. This plan has been challenged in the case now pending in the Supreme Court of the United States against the Delaware, Lackawanna & Western Railroad Co. and the Delaware, Lackawanna & Western Coal Co. The Government lost in the district court. Even though it should be successful in the Supreme Court, the commodities clause will still fall short of the purpose of Congress in enacting it, which was, I think, to divorce transportation from production. I recommend an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or produced, or which were manufactured or produced by any corporation controlled by it or affiliated with it by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transportation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated merely as a plant facility, from transporting in interstate commerce articles produced or owned by such

corporation, and I recommend appropriate legislation to that end."

The next legislative proposal did not come until December 31, 1914, when Mr. ADAMSON introduced a bill[5] reading as follows:

A BILL

"To divorce transportation in interstate and foreign commerce from manufacture, mining, production, and dealing, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That "commerce" as used herein means commerce between any State or Territory of the United States or the District of Columbia and any other State or Territory of the United States or the District of Columbia or any foreign nation, or within any Territory of the United States or the District of Columbia.

"SEC. 2. That from and after January first, nineteen hundred and seventeen, it shall be unlawful for any railroad company subject to the Act to regulate commerce to transport in commerce any articles or commodities thereafter manufactured, mined, or produced, first, by such railroad company or under its authority directly or indirectly, or, second, by any person, firm, or corporation subject to its control, or to whose control it is subject through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as it has or is otherwise subject to the same control. This prohibition shall apply irrespective of whether there is any relation, direct or indirect, between the railroad company and the articles or commodities at the time of transportation.

"SEC. 3. That from and after that date it shall also be unlawful for any railroad company subject to the

[5] H. R. 20470, 63d Cong., 3d Sess. (1914).

Act to regulate commerce to transport in commerce any articles or commodities the control of which, or any interest in which, direct or indirect, shall have been thereafter acquired in any other manner for the purpose of dealing therein, first, by such railroad company or under its authority, directly or indirectly, or, second, by any person, firm, or corporation subject to its control or to whose control it is subject through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as it has or is otherwise subject to the same control. This prohibition also shall apply irrespective of whether there is any relation, direct or indirect, between the railroad company and the articles or commodities at the time of transportation.

"SEC. 4. That from and after that date it shall also be unlawful for any railroad company subject to the Act to regulate commerce to transport in commerce any articles or commodities as to which there is at the time of transportation any contract, option, or understanding for the subsequent acquisition of control thereof, or of any interest therein, direct or indirect, first, by such railroad company or under its authority, directly or indirectly, or, second, by any person, firm, or corporation subject to its control, or to whose control it is subject, through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as it has or is otherwise subject to the same control.

"SEC. 5. That from and after January first, nineteen hundred and eighteen, it shall be unlawful for any railroad company subject to the Act to regulate commerce to transport in commerce any articles or commodities thereafter mined or produced from lands which at the time of production were owned or controlled, directly or indirectly, wholly or in part, first, by such railroad company, or, second, by any person, firm, or corporation subject to its control, or to whose control it is subject through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as

it has or is otherwise subject to the same control. This prohibition shall apply irrespective of whether there is any relation, direct or indirect, between the railroad company and the articles or commodities at the time of transportation.

"SEC. 6. That this Act shall not apply to the transportation by a railroad company of such articles or commodities as may be necessary and intended for its own use in the conduct of its business as a common carrier.

"SEC. 7. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Where a corporation is a defendant such proceedings may be brought not only in the district whereof it is an inhabitant but also in any district wherein it may be found or transacts business. The provisions of the Act approved February eleventh, nineteen hundred and three, commonly known as the expediting Act, as amended by an Act approved June twenty-fifth, nineteen hundred and ten, and by section two hundred and ninty-one of the Judicial Code, approved March third, nineteen hundred and eleven, together with all other provisions of law relating to procedure in suits in equity to enforce the Federal antitrust laws, shall be applicable to suits in equity to enforce this Act.

"SEC. 8. That a violation of this Act shall be a misdemeanor and shall be punishable by fine not exceeding $5,000 or by imprisonment not exceeding one year, or both, in the discretion of the court. A violation by a corporation shall be deemed to be also a violation by the individual directors, officers, receivers, trustees, or agents of such corporation who shall have authorized ordered, or done any of the acts constituting the violation in whole or in part.

"SEC. 9. That nothing herein contained shall be taken as repealing the sixth paragraph of section one.

of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended by the Act of June twenty-ninth, nineteen hundred and six, and subsequent Acts, and commonly known as the commodities clause, unless and except where inconsistent therewith."

The Committee on Interstate and Foreign Commerce held hearings on this bill on January 15, 1915, at which time Assistant Attorney General Todd appeared before the Committee representing Attorney General Gregory. During the course of his presentation, Mr. SIMS, a member of the Committee, asked him the following question:

"Has any case arisen where the coal company owned the railroad and shipped its product over its own railroad and in that way evaded the effect of the law?"

To this inquiry, Mr. TODD made the following reply:[6]

"That is my third point. I have stated two reasons why the present law fails to accomplish the object which apparently it is conceded Congress had in mind. The third reason is that the law itself, apparently, does not prohibit such a case as Mr. Sims stated, where the producing company owns and operates a railroad—at least it does not do so in terms. In the bill which the chairman has introduced that case is met.

"Perhaps I had better now summarize the three reasons why the present law does not accomplish a separation of transportation from production. The first reason is that under the decisions of the courts the act speaks as of the time of transportation, as it were, and does not prohibit a railroad company engaged in interstate commerce from transporting in interstate commerce articles which it produced, pro-

[6] Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 20470, 63rd Cong., 3d Sess., January 15, 1915, pp. 9-10. U. S. Senate Library Hearings, Volume 96, No. 5 (1915).

vided it parts with title before the transportation. The second reason is that it has been held that a railroad company has no interest, direct or indirect, in an article owned by a coal company whose stock in turn is owned by the railroad company, unless the railroad company has in the particular case so exerted its stock control over the coal company, so commingled with the affairs of the two as to make the coal company a mere department of the railroad company. The third deficiency is that under the existing law, by its terms at least, a producing or manufacturing company is not prohibited from owning and operating a railroad company. Of course, I take it that no one desires to prohibit a manufacturing company from owning a railroad company as a mere plant facility. What I mean is that under the existing law there is nothing to prevent a manufacturing company from owning what is virtually a trunkline railroad company."

The Committee took no action on the bill.

REPORT OF ATTORNEY GENERAL—1915

In his Annual Report to Congress for the fiscal year ended June 30, 1915, dated December 6, 1915, the Attorney General said, under the heading "Recommendations":[7]

1. AMENDMENT OF COMMODITIES CLAUSE OF INTERSTATE COMMERCE ACT.

"I renew my recommendation relating to the amendment of the commodities clause of the interstate commerce act.

* * * * *

"I therefore again recommend an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or pro-

[7] Report of Attorney General, 1915, pp. 7-8.

duced, or which were manufactured or produced by any corporation controlled by it or affiliated with by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transportation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated merely as a plant facility, from transporting in interstate commerce articles produced or owned by such corporation.

"A bill to carry out this recommendation was introduced in the last Congress by the chairman of the House Committee on Interstate Commerce (H. R. 20470)."

REPORT OF ATTORNEY GENERAL—1916

In his Annual Report to Congress for the fiscal year ended June 30, 1916, dated December 4, 1916, the Attorney General said, under the heading "Recommendations":[8]

"I renew the following recommendations contained in my last annual report:

* * * *

"I therefore urge an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or produced, or which were manufactured or produced by any corporation controlled by it or affiliated with it by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transportation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated

[8] Report of Attorney General, 1916, pp. 7-8.

merely as a plant facility, from transporting in interstate commerce articles produced or owned by such corporation.

"A bill to carry out this recommendation was introduced in the Sixty-third Congress, third session, by the chairman of the House Committee on Interstate Commerce (H. R. 20470)."

REPORT OF ATTORNEY GENERAL—1917

In his Annual Report to Congress for the fiscal year ended June 30, 1917, dated December 4, 1917, the Attorney General said, under the heading "Recommendations":[9]

"I therefore urge an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or produced, or which were manufactured or produced by any corporation controlled by it or affiliated with it by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transporation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated merely as a plant facility, from transporting in interstate commerce articles produced or owned by such corporation.

"A bill to carry out this recommendation was introduced in the Sixty-third Congress, third session, by the chairman of the House Committee on Interstate Commerce (H. R. 20470)."

TRANSPORTATION ACT OF 1920

The Act to Regulate Commerce was given a thoroughgoing revision by the Transportation Act of 1920,[10] but no change was made in the Commodities Clause, except to make it par. (8) of Sec. 1 of the Interstate Commerce Act.

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[9] Report of Attorney General, 1917, pp. 7-8.

[10] Act of February 28, 1920, 41 Stat. L. 475 (1920).

The Report of the Attorney General to the Congress for the fiscal year ended June 30, 1927, dated December 5, 1927, contains the following statement with respect to the Commodities Clause, as contained in the Report of Assistant to the Attorney General, William J. Donovan, in charge of the Anti-Trust Division:[11]

"THE COMMODITY CLAUSE

"In the *Tap Line cases* (234 U. S. 1, 27) the Supreme Court held that by the enactment of the commodity clause (sec. 1 (8), interstate commerce act) Congress 'sought to divorce transportation from production and manufacture and to make transportation a business of and by itself unallied with manufacture and production in which a carrier was itself interested'; and in *United States* v. *Reading Company* (253 U. S. 26, 60) that 'the purpose of the commodity clause was to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent position of carrier and shipper.'

"In recent years industrial and manufacturing corporations have acquired ownership or control of numerous railroads, comparatively small in size, but important, nevertheless, because of their strategic locations and the large volume of interstate traffic hauled by them. While operating as and enjoying all the privileges and powers of common carriers, generally speaking, these roads are but mere departments of the industrial corporations which own or control them and whose traffic is transported by them. The statute does not forbid the ownership of the roads by corporation, yet the evils of discrimination and preference resulting from such ownership are equally detrimental as when the carrier owns the manufacturing or producing company.

[11] Report of Attorney General, 1927, pp. 26-27.

Amendment of the commodity clause was recommended in the annual reports for the years 1910 to 1917, and a bill for this purpose was introduced before the Sixty-third Congress, third session (H. R. 20470).

THE TAP LINE CASES

234 U. S. 1, 27-28, 34 Sup. Ct. Rep. 741, 58 L.ed. 1185 (1914)

[Extract From Opinion of Mr. Justice Day]

While Congress, in enacting the commodities clause amending §1 of the act to regulate commerce sought to divorce transportation from production and manufacture, and to make transportation a business of and by itself, unallied with manufacture and production in which a carrier was itself interested, the debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show that the situation in some of the states as to the logging industry and transportation was sharply brought to the attention of Congress, and led to the exemption from the commodities clause of timber and the manufactured products thereof, thus indicating the intention to permit railroads to haul such lumber and products although it owned them itself. And that Congress had the constitutional power to enact such exemption was held in *United States ex rel. Atty. Gen.* v. *Delaware & H. Co.*, 213 U. S. 366, 416, 417, 53 L. ed. 836, 852, 853, 29 Sup. Ct. Rep. 527. This declaration of public policy which is now part of the commerce act cannot be ignored in interpreting the power and authority of the Commission under the act. The discussion resulting in the action of Congress shows that railroads built and owned by the same persons who own the timber were regarded as essential to the development of the timber regions in the Southwest, and the necessity of such roads was dwelt upon and set forth with ample illustration by Commissioner Prouty in his concurring opinion in this case.

REPORTS OF INTERSTATE COMMERCE COMMISSION WITH RESPECT TO COMMODITIES CLAUSE

The Interstate Commerce Commission, in its Annual Report for 1931, said:[12]

> "Another important case pending in the same court [District Court for the Northern District of Illinois] is *United States* v. *Elgin, Joliet & Eastern Railway Company*, wherein the applicability of the commodity clause of the act is at issue. This proceeding is based upon a petition for an injunction to restrain the carrier from transporting the products of an industry which controls the carrier, and is different from all other cases brought under the commodity clause, in that in former instances the carrier controlled the industry whose products is transported whereas in this case the reverse situation is presented. The petition was filed during the preceding year, but has not yet been heard on its merits."

In its Annual Report for 1932, the Commission said:[13]

> "Another important case, which was referred to in our last report and which still is pending in the District Court for the Northern District of Illinois, is *United States* v. *Elgin, J. & E. Ry.* Co. This proceeding is based upon a petition for an injunction to restrain the carrier from violating the provisions of the commodity clause of the act by transporting the products of an industry which controls the carrier. No hearing on the merits of the petition has yet been had."

In its Annual Report for 1933, the Commission said:[14]

> "*United States* v. *Elgin, J. & E. Ry. Co.*, wherein we are seeking to restrain the carrier from violating the provisions of the commodity clause of the act by transporting the products of an industry controlled by the carrier, is another important case which also was re-

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[12] 45 Annual Report of I. C. C. 15-16 (1931).
[13] 46 Annual Report of I. C. C. 51 (1932).
[14] 47 Annual Report of I. C. C. 44 (1933).

ferred to on page 51 of our last report. It is still pending in the District Court for the Northern District of Illinois, but has been set for hearing January 8, 1934. A similar proceeding against the Montour Railroad Co., which was instituted on October 31, 1933, is pending in the District Court for the Western District of Pennsylvania."

In its Annual Report for 1934, the Commission said:[15]

"Two cases mentioned in our last report, namely, *United States* v. *Elgin, J. & E. Ry. Co.* and *United States* v. *Montour R. R. Co.*, wherein we are seeking to restrain the carriers from violating the provisions of the commodities clause of the act, still are pending in the District Courts for the Northern District of Illinois and the Western District of Pennsylvania, respectively. In the former case a hearing has been held and briefs filed, and a decision is expected at an early date. No hearing has yet been held in the latter case."

In its Annual Report for 1935, the Commission said:[16]

"In our last report we mentioned two cases, wherein we are seeking to restrain carriers from violating the provisions of the commodities clause of the act, which were pending in the District Courts for the Western District of Pennsylvania and the Northern District of Illinois, respectively. These cases are *United States* v. *Montour R. R. Co.* and *United States* v. *Elgin, J. & E. Ry. Co.* The former still is pending a hearing in the district court. In the latter the court, on July 1, 1935, rendered an opinion, 11 F. Supp. 435, in which it was held that the evidence failed to show that the defendant has any interest in the articles or commodities which it transports for the subsidiaries of the United States Steel Corporation, and that the bill should be dismissed for want of equity. An appeal to the Supreme Court has been perfected."

In its Annual Report for 1936, the Commission said:[17]

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[15] 48 Annual Report of I. C. C. 46 (1934).
[16] 49 Annual Report of I. C. C. 53 (1935).
[17] 50 Annual Report of I. C. C. 50, 30 (1936).

"In *United States* v. *Elgin, Joliet & Eastern Ry. Co.* (298 U. S. 492), the Supreme Court upheld the decree of the District Court for the Northern District of Illinois (*United States* v. *Elgin, J. & E. Ry. Co.*, 11 F. Supp. 435), that the bill for an injunction brought by the Government to restrain the carrier from alleged violations of the commodities clause of the act should be dismissed for want of equity because the evidence failed to show that the defendant has any interest in the articles or commodities which it transports for the subsidiaries of the United States Steel Corporation, a holding company which owns all of the stock of the carrier. The Supreme Court held that (1) it was impossible for it to declare as matter of law that every company, all of whose shares are owned by a holding company, necessarily becomes an agent, instrumentality, or department of the latter; (2) whether such intimate relation exists between the two corporations is a question of fact to be determined upon evidence; and (3) the evidence failed to support the claim of the Government that the carrier must be regarded as the alter ego of its sole stockholder.

"One other case, alluded to in our last report, wherein the Government is seeking to restrain a carrier from violating the provisions of the commodities clause, still is pending in the District Court for the Western District of Pennsylvania. That case is based upon the relation existing between the Montour Railroad Co. and the Pittsburgh Coal Co., the latter, a producing company, owning all of the stock of the former."

* * * *

"In addition to the matters stated by us in our previous report we have reason to believe that some railroads subject to our jurisdiction evade the intent of the commodities clause, section 1(8) of the act, by having subsidiaries not subject to the act serve as vehicles for carrier investments.

"We recommend that Congress, in the light of facts already made available in our reports and in

reports of investigations conducted by congressional committees, shall determine the appropriate limit of our jurisdiction in such cases and whether further legislation to extend that jurisdiction is necessary."

REPORTS OF FEDERAL COORDINATOR OF TRANSPORTATION

Section 13 of the Emergency Railroad Transportation Act, 1933,[18] provided that the Federal Coordinator of Transportation should submit to the Interstate Commerce Commission from time to time such recommendations for further legislation as he might deem necessary or desirable in the public interest, and required the Commission promptly to transmit such recommendations, together with its comments thereon, to the President and to the Congress.

Pursuant to these provisions of the law, the Interstate Commerce Commission transmitted four such reports of the Federal Coordinator of Transportation to the President and to the Congress.[19] In none of these was any recommendation made for amendment of the Commodities Clause of the Interstate Commerce Act.[20]

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[18] Public Law No. 68, 73d Congress, approved June 16, 1933.

[19] Senate Document No. 119, 73d Congress, 2d Session (1934); Senate Document No. 152, 73d Congress, 2d Session (1934); House Document No. 89, 74th Congress, 1st Session (1935); House Document No. 394, 74th Congress, 2d Session (1936).

[20] On November 4, 1933, the Federal Coordinator of Transportation submitted to interested parties, organizations, and associations, a questionnaire designed to elicit their views as to legislation needed for the proper regulation of the transportation industry. One of the questions propounded was—

> Should the present Commodities Clause (Section 1, paragraph (8), Interstate Commerce Act) be modified to forbid by specific enactment the ownership of railroads by industries?

The returns to the questionnaire were almost unanimous in their views that there should be no such amendment. Consequently, there was no recommendation for any amendment.

CONSIDERATION OF COMMODITIES CLAUSE IN CONNECTION WITH TRANSPORTATION ACT OF 1940.

On September 20, 1938, President Roosevelt appointed a committee to consider the transportation problem and recommend legislation. That committee was composed of Mr. Carl R. Gray, Vice-Chairman, Union Pacific Railroad, who was Chairman of the Committee; Mr. M. W. Clement, President of the Pennsylvania Railroad; and Mr. Ernest E. Norris, President of the Southern Railway, representing management; Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, Etc., and Chairman of the Railway Labor Executives Association; Mr. B. M. Jewell, President of the Railway Employees Department of the American Federation of Labor; Mr. D. B. Robertson, President of the Brotherhood of Locomotive Firemen and Enginemen. This Committee has been generally referred to as the "Committee of Six." That Committee submitted its report to the President of the United States on December 23, 1938.[1]

A bill designed to carry out the recommendations of the Committee of Six was prepared. Section 12 of that bill, relating to the Commodities Clause, initially read as follows:[2]

> "Sec. 12. It shall be unlawful for any carrier by railroad and, on and after January 1, 1941, it shall be unlawful for any carrier, to transport in commerce subject to this Act any article or commodity, other than timber and the manufactured products thereof,

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[1] This report was never printed as a Congressional document. However, it was submitted to the Committees of Congress during the consideration of the legislation which resulted in the Transportation Act of 1940, and is frequently referred to in the hearings, etc. It is filed in the Library of Congress, and carries notation "L. C. Card No. A 39-1."

[2] Committee Print No. 1, March 1, 1939, Transportation Bill proposed by the Committee of Six, 79th Congress, First Session, H. R. House Committee on Interstate and Foreign Commerce.

manufactured, mined, or produced by it or under its authority, or which it may own, in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for use in the conduct of its business as a carrier."

When the bill was introduced in the House, on March 8, 1939, by Chairman Lea of the Committee on Interstate and Foreign Commerce, no change had been made in this language.[3]

When the bill was being drafted for introduction in the Senate, the foregoing language was changed. In Confidential Committee Print No. 2, dated March 18, 1939, Section 12, relating to the Commodities Clause, was redrafted to read as follows:

"Sec. 12. *It* shall be unlawful for any *common carrier subject to the provisions of this Act* to transport from any State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by *or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or any such article or commodity in which such carrier, subsidiary, affiliate, or controlling person has any personal, direct or indirect, legal or equitable, interest,* except such articles or commodities as may be necessary or intended for use in the conduct of *the carrier* business of such carrier."[4]

In Confidential Committee Print No. 3, dated March 28, 1939, Section 12, relating to the Commodities Clause, was changed to read as follows:

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[3] H. R. 4862, 76th Congress, First Session, pp. 39-40.

[4] Confidential Committee Print No. 2, S. 2009, 76th Congress, First Session, March 18, 1939, p. 50. Senate Committee on Interstate Commerce.

"Sec. 12. It shall be unlawful for any carrier by railroad and, on and after January 1, 1941, it shall be unlawful for any carrier, other than a carrier by air, to transport, in commerce subject to this Act, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or any such article or commodity in which such carrier, subsidiary, affiliate, or controlling person has any interest, direct or indirect, legal or equitable, except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier." [5]

The foregoing text remained unchanged when S. 2009 was introduced in the Senate on March 30, 1939.[6]

Hearings on S. 2009 (along with S. 1310, S. 1869 and S. 2016) were held by the Senate Committee on Interstate Commerce from April 3 to April 14, 1939.

Chairman Wheeler, at the beginning of the hearings, on April 3, 1939, said that one of the purposes of the bill, S. 2009, was:

"To make effective the intent of Congress in prohibiting railroads, or other carriers after January 1, 1941, from transporting products not utilized in the conduct of their transportation business but in which they have an interest, direct or indirect." [7]

On April 10, 1939, during the course of the hearings, a witness before the Committee, representing paper manufacturers, said: [8]

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[5] Confidential Committee Print No. 3, S. 2009, 76th Congress, First Session, March 28, 1939, pp. 44-45. Senate Committee on Interstate Commerce.

[6] S. 2009, 76th Congress, First Session, March 30, 1939, pp. 44-45.

[7] Hearings before the Committee on Interstate Commerce, United States Senate, 76th Congress, First Session; Transportation Act of 1939, p. 3.

[8] Hearings, Note 7, *supra*, p. 427.

"With reference to section 12, the so-called commodities clause, extends to water carriers the same provisions which now apply to rail carriers, that they shall not carry any commodities in which they have an interest, other than timber and the manufactured products thereof.

"In addition, the carrier is prohibited from carrying any commodity in which an industry or a person has any interest, where such industry or person has any interest whatsoever, even equitable, in the carrier.

"This is a new and far-reaching theory of regulation of water carriers in particular.

"The exemption of timber and manufactures thereof, we assume, is carried over from the Hepburn Act of 1908, which, we understand, was designed to permit the land-grant railroads to cut and ship timber and its manufactures from their land grants. We assume that this exemption would also apply to pulp and paper made from timber, but we would like to be sure. We would like to ask the question as to whether you can give us an answer on that. Pulp and paper are made from timber. Would they also come under that exemption?"

Thereupon, Chairman Wheeler made the following statement:[9]

"Let me say this to you with reference to the commodities clause, so that there will not be a lot of time wasted on it. I am speaking for myself and not for the committee. I think the commodities clause will have to be changed; and if we are going to make such drastic changes in the commodity clause as this bill would suggest, I think it ought not to be incorporated in this particular piece of legislation, but should come up as a separate piece of legislation so that we can devote considerable time and thought to that particular subject. This would so change the economic structure of a lot of industries that I think it is something that would have to have particular consideration in a separate piece of legislation."

[9] Hearings, Note 7, *supra*, p. 427.

Then the following colloquy occurred:[10]

"The Witness. I am very glad to hear that, sir.

"The Chairman. I want to make my position clear upon it.

"The Witness. Would you like me to continue with my statement as to the commodity clause?

"The Chairman. It is all right; but I want to say that I think it is foolish for a lot of people to come in here and waste our time and their own time talking about that, and for that reason I wanted to make it clear by that statement."

On the following day, April 11, 1939, President J. M. Hood, of The American Short Line Railroad Association, appearing before the Committee as a witness, said:[11]

"Yesterday a Senator stated for the record that the commodities clause, as now contained in the bill at page 44, in section 12, would be materially modified before the bill would receive the serious attention of the committee. Based on that reservation we are not going to have much to say in opposition of the inclusion of the commodities clause as now written. Had we not been in a position to rely upon that statement of the Chairman, and similarly indicated positions of other members of the committee, it would have been our purpose to oppose with considerable emphasis the extension of the commodities clause as now contained in the bill.

"You do not need to go out of Washington to ascertain just how serious and far-reaching it would have been. The State of Virginia owns one-seventh of the Richmond, Fredericksburg & Potomac Railroad. The commodities clause, as contained in this bill, if it were enacted, would make it unlawful for the Richmond, Fredericksburg & Potomac Railroad to carry any traffic in which the State of Virginia had an interest.

[10] Hearings, Note 7, *supra*, p. 427.
[11] Hearings, Note 8, *supra*, pp. 541-542.

"It would be impossible for many communities which need rail facilities to develop raw materials or a labor market, or to take advantage of some climatic condition which permits processing of a particular nature, to provide, with the aid of those particularly interested, rail facilities.

"Had this clause been before you in a serious manner I would have gone into detail on behalf of 135 common carriers by railroad, who would be directly affected by the terms of this clause. Their total mileage is 6,310; their investment in rail property is $570,000,000, and they have 31,400 employees.

"Should this committee decide to give further consideration to an extension of the commodities clause as applicable to rail transporation, we ask that we be permitted to make further appearance, either orally or in the form of a brief in opposition thereto.

"We frequently have railroads incorporated and organized to operate a branch line which has been abandoned by a trunk line. Invariably the investors in that newly organized property are the people whose private business are threatened with elimination through the lack of rail facilities.

"To be specific, five wine distilleries in the State of New York, in the so-called champagne belt, took over a branch line of the Erie Railroad following the 1935 flood, not because they wanted to go into the rail business, but because they wanted to stay in the wine business. Each contributed 20 percent of the capital necessary to incorporate and operate the railroad, and now they are very much worried about this commodities clause.

"Senator REED. What is the name of that railroad?

"Mr. HOOD. Bath & Hammondsport, Hammondsport, N. Y. Five owners of wineries, each owns 20 percent of the railroad.

"Now, that is one circumstance of many, I think a fair statement of the number of those similar solutions to the rail-abandonment problem, of which we

have records in our office, and with whom we are corresponding, is at least 50, where threatened abandonment is facing us today, in which farmers, the coal producers and haulers, the petroleum distributors, wholesalers, and manufacturers have gotten together and are prepared to make substantial investments of the amount of money necessary to retain and provide rail facilities.

"Your commodities clause would make that an illegal carrier. I am sure you would not give that serious consideration, but if you are, we will want the privilege of telling you the history of the clause, what it did correct, its purpose, and any abuses which may prevail in the carrier business are amply guarded against through other sections of the Interstate Commerce Act and other acts of the Federal Government, and it is not necessary to amputate the patient below the chin just to get rid of an ingrown toe nail."

Thereupon, there was no further discussion of the commodities clause during the course of the hearing.

When the Senate Committee on Interstate Commerce began consideration of S. 2009 in the light of the hearings which had been held, the proposed change in the language of the Commodities Clause was stricken from the bill, and the existing language restored to it.[12]

No further change was made in this language in Committee Print No. 5, dated May 9, 1939, or in Committee Print No. 6, dated May 12, 1939.

Consequently, when S. 2009 was reported to the Senate, by the Committee on Interstate Commerce, on May 16, 1939, the proposed change in the Commodities Clause had been eliminated and the existing language retained.[13]

Commenting on this, the Committee said:

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[12] Committee Print No. 4, S. 2009, 76th Congress, First Session, May ——, 1939, pp. 50-51. Senate Committee on Interstate Commerce.

[13] S. 2009, 76th Congress, First Session, as reported by Senate Committee on Interstate Commerce, May 16, 1939, pp. 52-53.

"Section 12. Commodities Clause.—This provision retains the Commodities Clause (Sec. 1 (8) of Interstate Commerce Act), now applicable only to railroads, in its present form. The rewritten Commodities Clause was considered far too drastic and the subcommittee early decided against any change therein." [14]

After three days of debate, S. 2009 was passed by the Senate on May 25, 1939, by a vote of 70 to 6, without any change being made in the Commodities Clause.[15]

S. 2009, as passed by the Senate, was under consideration by the Committee on Interstate and Foreign Commerce of the House of Representatives from May 29, 1939, to July 18, 1939, at which time it was reported. The bill as passed by the Senate rewrote and codified the Interstate Commerce Act, and provided for a combined statement of the regulatory law for carriers by rail, highway and water. The bill as reported by the House Committee on Interstate and Foreign Commerce omitted the codification of the Interstate Commerce Act, made certain amendments to the then-existing railroad provisions and motor vehicle provisions and wrote a new part providing for regulation of water carriers.[16]

The bill as reported proposed no change in the Commodities Clause.[17]

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[14] Senate Report No. 433, 76th Congress, First Session, May 16, 1939, to accompany S. 2009, p. 15.

[15] S. 2009, 76th Congress, First Session, as referred to the Committee on Interstate and Foreign Commerce of the House of Representatives, May 29, 1939, pp. 49-50.

[16] Mimeographed statement by Chairman Lea of the House Committee on Interstate and Foreign Commerce, July 18, 1939.

[17] House Report No. 1217, 76th Congress, First Session, July 18, 1939, to accompany S. 2009; Comparative Print, July 20, 1939, showing changes in existing law proposed by the Committee substitute for S. 2009, pp. 9-10. House Committee on Interstate and Foreign Commerce.

and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake & Ohio bought it, and the cost of transportation from Newport News to Connecticut, would aggregate $2.47 per ton, thus leaving to the Chesapeake & Ohio only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton.

Referring to the developments before the Commission, and annexing as part thereof the testimony taken on such hearing and the documents connected therewith, the petition further alleged that the Chesapeake & Ohio asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, and was not a discrimination, for two reasons: First. Because if such difference existed, it was a loss suffered

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by the Chesapeake & Ohio, not from taking less than its published rates, but because it had received less as seller than the coal had cost. Second. That even if it had not the lawful right thus to impute the payment of the price of the coal, the Chesapeake & Ohio had, in fact, received much more for the coal than the price in money agreed on, because, at the time the verbal agreement to sell was made, the New Haven had a claim exceeding $100,000 against the Chesapeake & Ohio, arising from a previous written contract to deliver coal, which was to be extinguished by the completion of the delivery of the coal, and this caused that price largely to exceed the cost of the coal to the Chesapeake & Ohio, including its published rates. Averring

that the prior contract was in itself void because it also embodied an agreement to take less than the published rates, and was discriminating, it was charged that the New Haven had entered into both agreements with the Chesapeake & Ohio, knowing that they were in violation of the interstate commerce law. The prayer was that the Chesapeake & Ohio and the New Haven be made parties; that both roads be enjoined, the one from further executing the verbal agreement to deliver coal, and the other from seeking to enforce it; that the Chesapeake & Ohio be enjoined from "accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it," and be, moreover, enjoined from "doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported . . . at a less rate than named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce and acts amendatory thereof or supplementary thereto, or whereby any other advantage may be given or discrimination practised." And that the New Haven road "be enjoined and restrained from accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it."

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A preliminary restraining order was issued, conforming to the prayer of the petition. The Chesapeake & Ohio by its answer admitted that it had made, in the spring of 1903, a verbal agreement with the New Haven road for about 60,000 tons of Kanawha coal for the price alleged in the petition, to be transported by it to Newport News, and thence delivered by ocean transportation to the New Haven in Connecticut. It was admitted that the purchase price agreed to be paid was less than the market price of the

The bill was passed by the House on July 26, 1939, without change being made in the Commodities Clause.[18]

No change was made in the Commodities Clause by the Transportation Act of 1940.[19]

[18] 84 Cong. Rec. 14029 (1939); S. 2009 prints, with amendments of House of Representatives, July 26, 1939. Senate of the United States.

[19] Act approved September 18, 1940, 54 Stat. L. 898.

NEW YORK, NEW HAVEN & HARTFORD R. CO. v. INTERSTATE COMMERCE COMMISSION

200 U.S. 361, 26 Sup. Ct. Rep. 272, 50 L. ed. 515 (1906).

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, *Appt.*,

v.

INTERSTATE COMMERCE COMMISSION. (No. 24.)

INTERSTATE COMMERCE COMMISSION, *Appt.*,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, and New York, New Haven, & Harford Railroad Company. (No. 27.)

1. **Commerce — Federal regulations — maintenance of published rates by interstate carrier—undue preferences and discrimination.**—An interstate carrier not empowered by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce to mine and market coal violates the mandate of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery.

2. **Commerce — Federal regulations — maintenance of published rates by interstate carrier — undue preferences and discrimination.**—Deliveries of coal by an interstate carrier not empowered to mine and market coal by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce, under a contract to sell and transport such coal at a stipulated price, come within the requirement of that

act respecting the maintenance of published rates, and its prohibitions against undue preferences and discrimination whenever, from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the contract may not have been open to that objection when made.

3. **Statutes—construction by the body charged with enforcement.**—The prohibitions of the act to regulate commerce as to rebates, favoritism, and discrimination having been construed by the Interstate Commerce Commission, charged with its execution, to be inapplicable to the freight rates for coal charged by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of that act, this construction, which has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, must be treated as read into the statute.

4. **Injunction — extent of relief — general injunction.**—A carrier which has been adjudged to have violated the act to regulate commerce in a specific particular may be restrained from further like violations of the act, but should not be enjoined in general terms from violating the act in the future in any particular.

[Nos. 24, 27.]

Argued October 25, 26, 1905. *Decided February* 19, 1906.

CROSS APPEALS from the Circuit Court of the United States for the Western District of Virginia to review a decree enjoining an interstate carrier from violating prohibitions of the act to regulate commerce against undue preferences and discriminations. Modified by enjoining the taking of less than the published tariff of

freight rates by means of dealing in the purchase and sale of coal, and as *modified, affirmed.*

See same case below, 128 Fed. 59.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

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Mr. Justice White, delivered the opinion of the court:

Following an inquiry, begun in consequence of a complaint to it made, the Interstate Commerce Commission, through the Attorney General of the United States, filed under the act to further regulate commerce (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1905, p. 599), in the circuit court of the United States for the western district of Virginia, this proceeding against the Chesapeake & Ohio Railway Company, a Virginia corporation, and the

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New York, New Haven, & Hartford Railroad Company, a corporation of the state of Connecticut. In this opinion we shall hereafter respectively speak of the parties as the Commission, the Chesapeake & Ohio, and the New Haven. The petition averred that the Chesapeake & Ohio was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven, in Connecticut, and charged that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others, all in violation of the act to regulate commerce and the amendments thereto. Specifying the grounds of the complaint, it was alleged that in the spring of 1903 the Chesapeake & Ohio made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News,

coal, plus the published rates and the cost of transportation and delivery from Newport News to Connecticut, but it was averred that this was only apparently the case, because the contract to sell included the discharge of a debt of about $100,000, arising from the previous written contract to which the petition referred. The validity of both the previous written contract and the later verbal agreement was averred. The right of the Chesapeake & Ohio to buy and sell coal, and to impute any loss on the sale of the coal to itself as dealer instead of to itself as a carrier, was averred. Both the original contract and the one of 1903 were averred to have been made in good faith, not with any intention to avoid the published rates, and it was charged that, at about the time the original contract was made, arrangements had been made by the railroad for a rate of transportation from Newport News to Connecticut which would have caused the contract price to be adequate to pay the market price of the coal and all other charges, including the published rates, but that, subsequently thereto, the persons with whom this contract for transportation was made had violated their agreement, and that by strikes the price of coal had advanced, and thereby the loss of $100,000 to the Chesapeake & Ohio was occasioned.

The New Haven road, in its answer, asserted its good faith in making both the original contract and the verbal agreement. It alleged that by the original contract it was a mere purchaser of coal from the Chesapeake & Ohio, and not a shipper over that road; that the coal bought was intended for its own use in the operation of its rail-

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road; that it had no knowledge of the price which the Chesapeake & Ohio would be obliged to pay for the coal, or the sum which it would cost that road to deliver it, and therefore had no knowledge that the total cost would not

equal the market price of the coal, the cost of delivery, and the published rate of the Chesapeake & Ohio. It averred the validity of the agreement, the legality of the debt of $100,000 which resulted from it, and charged that, taking that debt into consideration, the sum which it paid the Chesapeake & Ohio for the coal under the 1903 verbal agreement largely exceeded the market price and the cost of delivery, including the published rates of the Chesapeake & Ohio. It denied that there was any departure from the published rates or any discrimination, asserted that at the time the original contract was made the price was sufficient to have enabled the Chesapeake & Ohio to perform the contract without losing anything either as a seller or as a carrier, and that if, in execution of the contract, a condition arose where a loss as suffered by the Chesapeake & Ohio in either capacity, it was caused by subsequent events which could not effect the validity of the contract when made, and especially denied that in any way, directly or indirectly, had it knowingly lent itself to any discrimination, or any taking by the Chesapeake & Ohio of less than its published rates.

The case was heard on the testimony taken in the proceeding before the Commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel.

For reasons to which we shall hereafter have occasion to advert, the court held that, considering both the original contract and the verbal agreement of 1903, there was no violation of the provisions of the 2d and 6th sections of the act to regulate commerce, forbidding the taking of less than the published rates. [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154.] It, however, held that the contracts amounted to an undue discrimination and a violation of the 3d section of the act. The court, hence, permanently enjoined the Chesapeake & Ohio from dis-

charging any obligation arising from the original contract of 1896, and from further executing or attempting to execute, in any manner whatever, directly or indirectly, the verbal agreement of 1903, and it permanently enjoined the New Haven from asserting or attempting to enforce any claim arising from the contract of 1896, or in any manner, directly or indirectly, attempting to enforce the verbal agreement of 1903. Thereafter the court denied a request made by the Commission, that the injunction be expanded so as, in general terms, to command the Chesapeake & Ohio perpetually to observe in the future its published rates.

The New Haven appealed. The Commission also prosecuted a cross appeal because of the refusal of the court to grant its prayer to make the injunction against the Chesapeake & Ohio general in its nature, and that company, in an elaborate and separate printed argument in its own behalf, assails the judgment below on the merits, and in effect asks its reversal on the merits.

It is apparent from the case as thus stated that, in order to decide the issues which arise, we may not confine our attention to the verbal agreement of 1903, the execution of which it was the immediate object of the proceeding to enjoin, but must consider the prior contract of 1896, since primarily the rights, if any, which arose under the verbal agreement, are inextricably involved in and dependent upon the contract of 1896. In other words, the controversy, as considered by the Commission on the inquiry by it conducted, and as decided below, and as here presented, involves an analysis of all the dealings under both contracts, and the legal rights, if any, which arose from them. We must, therefore, consider the subject in this aspect, and to do so we state at once the facts which are admitted or which are undisputably established, reserving such questions of fact as are in dispute for separate consider-

ation when we approach the legal propositions which arise from the undisputed facts.

The Chesapeake & Ohio, chartered by the state of Virginia, operates a road which reaches both the New River

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and the Kanawha coal fields of West Virginia, and extends to Newport News. The New Haven, chartered by the state of Connecticut, operates a road principally situated in New England. On December 3, 1896, these two roads entered into a written contract, the one to sell and the other to buy, between July 1, 1897, and July 1, 1902, not to exceed 2,000,000 gross tons of bituminous coal, to be taken from the line of the Chesapeake & Ohio road; deliveries to be made not exceeding 400,000 tons per annum. The price agreed upon was $2.75 per gross ton, New Haven basis, settlement to be made monthly. The coal was to be delivered by the seller on the line of the New Haven. The contract is reproduced in the margin.[1]

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[1] Contract Made between the Chesapeake & Ohio Railway Company and the New York, New Haven, & Hartford Railroad Company.

Said Chesapeake & Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed 2,000,000 gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding 400,000 tons per annum.

And said Chesapeake & Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed.

And said Chesapeake & Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake & Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundredths dollars per gross ton. New Haven basis, settlement to be made monthly.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

The Chesapeake & Ohio, not in its own name, but through others who really, although not ostensibly, acted for it, made a contract with operators in the New River district of West Virginia, for the delivery to it of the coal to fulfil the contract which had been made with the New Haven. In consequence of failure of some of the operators to per-

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form their part of the contract, changes were made at various times, which it is unnecessary to note. Deliveries of the coal were made to the New Haven as required up to the winter of 1900-1901, when, because of strikes and other difficulties, delivery ceased, and the New Haven bought coal in the open market and presented to the Chesapeake & Ohio a bill for the increased price which it had paid, and the Chesapeake & Ohio paid $160,000 to cover such loss. Subsequently, in 1902, further strikes supervened and deliveries again ceased, at a time when about 60,000 tons remained yet to be delivered. The New Haven again presented a bill for damages amounting to $103,000. Thereupon the verbal agreement of 1903 was made, by which it was provided that the shortage of 60,000 tons upon the original contract might be discharged by delivery on the part of the Chesapeake & Ohio of that amount of coal from the Kanawha district at the contract price of $2.75, and when this delivery was consummated it was agreed that the Chesapeake & Ohio would be absolutely relieved from the payment of the damage claim just referred to.

Witness the names of the parties hereto this, the 3d day of December, 1896.

Chesapeake & Ohio Railway Company,
By. M. E. Ingalls, President.

The New York, New Haven, & Hartford Railroad Company.
By C. E. Mellen, Second Vice President.

For value received, I hereby guarantee that the Chesapeake & Ohio Railway Company shall not fail to deliver coal on account of strikes.

J. Pierpont Morgan.

At the time this verbal agreement was made the contract price was, leaving out of view the claim for damages, inadequate to pay the market price, as admitted by the pleadings, of the coal plus the published rates of the Chesapeake & Ohio to Newport News, and the charges thence to the point of delivery. To put itself in a position to carry out the agreement, an individual who represented

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the Chesapeake & Ohio made contracts in its own name with the operators in the Kanawha district to furnish the desired coal. Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake & Ohio bore the loss arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery.

Undoubtedly, long prior to the making of the first contract the Chesapeake & Ohio, besides its business as a carrier, bought and sold coal. This business was carried on by the company from about 1874 up to the time of the making of the contract of 1896, as testified by the president who made that contract, as follows:

"The coal was handled by a separate and distinct department of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the selling price of the coal representing the freight earned by the railway company."

And the same official testified that he made the contract of 1896 as a continuation of this system.

In 1895, however, the state of West Virginia passed "An Act to Prevent Railroad Companies from Buying or Selling Coal or Coke and to Prevent Discrimination." The

1st section of this act made it unlawful for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke. In consequence of this act, prior to the making of the contract of 1896, the coal department of the railroad was abolished. And it was the existence of the West Virginia statute which caused the Chesapeake & Ohio, when it contracted with operators in West Virginia to procure as to both contracts the coal for delivery to the New Haven, to do so not in its own name, but through another.

Before applying to these undisputed facts the legal question arising for decision, we must determine a question

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of fact as to which there is some dispute; that is, was the price at which the Chesapeake & Ohio contracted in 1896 to sell the coal to the New Haven sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate? Without stopping to go into the evidence, we content ourselves with saying that we think the court below correctly held that the price was not adequate to accomplish these purposes, and that from the inception of delivery under the contract, and during the whole period thereof, except for a brief time, caused by a lowering of the freight rates, the contract price was inadequate to net the railroad its proper legal tariff.

We are brought, then, to determine whether the contract made in 1896 for the 2,000,000 tons of coal was void because in conflict with the act to regulate commerce and its amendments. In approaching the consideration of the act to regulate commerce, we, for the moment, put out of view the provisions of the West Virginia statute, and its influence upon the validity of the contract made in West Virginia for the purpose of acquiring the coal which the Chesapeake & Ohio had obligated itself to deliver. We

shall also assume, for the purpose of the inquiry, that the Chesapeake & Ohio, although not expressly authorized, was not prohibited by its Virginia charter from buying and selling and transporting the coal in which it dealt. The case, therefore, will be considered solely in the light of the operation and effect of the provisions of the act to regulate commerce, and we shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions.

The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the con-

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tract does not pay the cost of purchase, the cost of delivery, and the published freight rates?

The previous decisions of this court concerning the interstate commerce act do not afford much aid in determining this question: This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions, against discrimination, favoritism, or rebates, but have mainly concerned the meaning of the act in other respects; that is, involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission.

There are several leading cases decided by the Commission, which are relied upon by the two railroads, di-

rectly relating to the question we have stated, but, as we shall have occasion hereafter to weigh their import, we shall not now pause to analyze and apply them.

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the 2d section of the act, that no departure from the published rate shall be made, "directly or indirectly,"

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how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be

brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may, by becoming a dealer, buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must

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result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as, by the departure from the tariff

rates, the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person, so selected by the carrier, would have a monopoly in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately, and not merely remotely, to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts undisputably shown on this record. For here it is unquestioned that the Chesapeake & Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law, and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of *Atty. Gen.* v. *Great Northern R. Co.* 29 L. J. Ch. N. S. 794. In that case Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was illegal, because incompatible with its duties as a public carrier and calculated to inflict an injury upon the public. In deciding that the act of Parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, the reason for the rule was thus expressed (p. 798):

> "These large companies, joint-stock companies generally,* for whatever purpose established, and more
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>
> particularly railway companies, are armed with powers of raising and possessing large sums of money,—amounts of property,—and if they were to apply that

money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways."

Illustrating the danger to the public, as established by the case before him, the Vice Chancellor said (p. 799):

"Here we find this company, having the traffic from the north of England, where the great coal fields are (at least, some of the principal coal fields), supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has)—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic; that is, the dealing in all the coal in the large districts supplying coal to the country. They have, to a considerable extent, done so, and there is no reason why it should not go on progressing. I observe that in the eight [?] years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agriculture produce, and become great dealers in the supply of edibles to the markets of London and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore," great detriment to the interests of the

public, for this reason, taking merely the article of coal."

It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers, as between themselves and in their dealings with the carrier, would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism and other causes. Interpreting the prohibition of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier, and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage," and "unjust discrimination," are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and, as such dealer, to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute, the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates would not only destroy the remedy intended to be afforded by the

provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions * urged at bar to establish the right of the car-

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rier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions.

(*a*) It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer, and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.

(*b*) It is said that, as in the case in hand, it is shown that there was no intention on the part of the carrier in making the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proof shows an arrangement made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate, therefore an honest contract made by the carrier should not be stricken down because of things over which

the carrier had no control." The proposition involves both an unfounded assumption of fact and an unwarranted implication of law. It is true the court below found that the proof did not justify the inference that the Chesapeake & Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. Whilst it may be that the proof establishes that the contract for the sale of coal was not made as a mere device for avoiding the operation of

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the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake & Ohio was wholly indifferent to and did not concern itself with, the prohibitions of the statute, of which, of course, it must be assumed to have had full knowledge. As we have seen, the president of the Chesapeake & Ohio, by whom the corporation was represented in making the contract, expressly testified that from the beginning that corporation had pursued the policy of acquiring all the coal mined on its line, and sold it, relying upon the net result of such sales for its freight compensation, and that the particular contract was made in continuation of that policy. We find it impossible to conclude, from the proof, that the Chesapeake & Ohio could have made a contract for so large an amount of coal, to be delivered over so long a period, without taking into view the existing prices and the cost necessarily to be occasioned by the delivery of the coal, if the full published freight rates were to be realized. Indeed, the proof leaves no doubt upon our minds that in making the contract, the Chesapeake & Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the interstate commerce act. In other words, we think it is established beyond doubt that, desir-

ing to stimulate the production of coal along its line, and thereby, as it conceived, to increase the carriage of that commodity, and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake & Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have done so would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would * besides have caused

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other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake & Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake & Ohio of the economic conceptions upon which the interstate commerce law rests, and a substitution in their stead of the conceptions of the Chesapeake & Ohio as to what was best for itself and for the public. Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc.,

the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depends not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute.

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(*c*) It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of ap-

plying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

But it is in effect said, conceding this to be true as an original question, the prohibitions of the act ought not now to be interpreted as applying to a carrier who is a dealer in commodities, because of an administrative construction long since given to the act by the interstate commerce commission, the body primarily charged with its enforcement, and which has become a rule of property, affecting vast interests, which should not be judicially departed from, especially as such construction, it is asserted, has been impliedly sanctioned by Congress by frequently amending the act without changing it in this particular.

Passing, for the present, the legal conclusion, let us first ascertain whether the premise itself is well founded. The two rulings of the Interstate Commerce Commission upon which the premise is based are *Haddock* v. *Delaware L.*

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& W. R. Co. 4 I. C. C. Rep. 296, 3 Inters .Com. Rep. 302, and *Coxe Bros. v. Lehigh Valley R. Co.* 4 I. C. C. Rep. 535, 3 Inters. Com. Rep. 460, decided respectively in 1890 and 1891.

Without going into detail, we content ourselves with saying that in both of the cases complaints were made to the Interstate Commerce Commission concerning the defendant railroads, and it was charged that whilst acting as common carriers they were dealing in coal, and as a

result violating the prohibitions of the interstate commerce act as to rates and undue preferences and discriminations. It was shown in both cases that the carriers, prior to the adoption of the interstate commerce act, were authorized by their charters or legislative authority to carry on both the business of mining and selling the coal so mined, and transporting the same to market. Indeed, it was found in both cases that the functions of producing and transporting, as authorized, were so interblended that it was impossible to separate one from the other. Whilst it is true that in both of the cases it was also shown that the carriers bought, sold, and transported some coal which was not produced in the mines which they owned, this fact was evidently treated, in view of the other circumstances of the case, as of minor importance, since the commingled powers of producing, selling, and transporting were alone made the basis of the conclusion reached by the Commission as to the character of relief which could be afforded. Solely in view of the lawful power of the carriers to mine, sell, and transport, existing before the passage of the act to regulate commerce, the Commission decided that its authority, under that statute and under the circumstances of the case, was confined to compelling the exaction of rates which were just and reasonable. The fact that the rulings in the two cases just referred to were solely placed upon the peculiar powers of the defendant corporations possessed by them prior to the passage of the interstate commerce act was pointed out by the Commission in *Re Alleged Unlawful Rates*, 7 I. C. C. Rep. 33. In that case, in deciding that the defend-

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ant carrier was without power to purchase grain for the purpose of securing the right to transport it, and thus evade the law which would have applied to its transportation had it been owned by any other party, the Commission,

in distinguishing the case before it from the *Haddock* and *Coxe Bros. Cases*, said (p. 38):

> "Those cases are in no respect similar to this. In both the common carrier was also the owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act, and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property; and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to inquire whether the rate charged the complainant was a reasonable one."

Now, without at all intimating that, as an original question, we would concur in the view expressed in the case last cited, that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the *Haddock* and *Coxe Bros. Cases* would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases, and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least, until Congress has legislated on the subject. We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been

impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight, and was not lightly to be interfered with. The concessions thus made, however, are wholly irrelevant to the case before us. This follows since the Chesapeake & Ohio was, neither by its charter nor by legislative grant existing at the time of the adoption of the act to regulate commerce, possessed of the commingled attributes of carrier and producer, which was the controlling consideration in the decisions made in the *Haddock* and *Coxe Bros. Cases.*

Concluding therefore, that both the contracts made by the Chesapeake & Ohio with the New Haven were contrary to public policy, and void because in conflict with the prohibitions of the act to regulate commerce, it obviously follows that such contracts were not susceptible of being enforced by the New Haven, and afforded no legal basis for a claim of the New Haven against the Chesapeake & Ohio, and therefore the court below was correct in so doing.

This leaves only for consideration the question raised by the cross appeal of the Interstate Commerce Commission. That proposition is thus stated in the first of the assignments of error filed on behalf of the Commission:

> "That the circuit court of the United States for the western district of Virginia, after finding that the claim of the New York, New Haven, & Hartford Railroad Company against the Chesapeake & Ohio Railway Company for $103,910.69, asserted as damages arising

from a partial nonperformance by said railway company of a contract of December 3, 1896, set out in the

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record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the lines of said railway company, and thence transported by vessels to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake & Ohio Railway Company, its officers, agents, and employees from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further joined and restrained the Chesapeake & Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake & Ohio Railway Company from transporting coal from one state to or through any other state for the New York, New Haven, & Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven, & Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage; and said decree, entered by the court on the 19th day

of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven, & Hartford Railroad Company and its

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officers and agents from seeking or accepting, in any manner, any direct or indirect rebate of the duly established freight rates of the Chesapeake & Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage."

The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from further like violation of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the antitrust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was

granted in the case of *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, was not open to such an objection as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.

As the court below did not decide that the 2d and 6th

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sections of the act, relating to the maintenance of rates, had been violated, the injunction by it issued was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed in its published tariff of frieght rates, by means of dealing in the purchase and sale of coal. And, *as thus modified, the decree below is affirmed.*

UNITED STATES v. DELAWARE & HUDSON CO., 213 U.S. 366, 29 Sup. Ct. Rep. 527, 53 L.ed. 836 (1909)

UNITED STATES EX REL. ATTORNEY GENERAL OF THE UNITED STATES, Pl'ff in Err.,

v.

DELAWARE & HUDSON COMPANY. (No. 559.)

SAME

v.

ERIE RAILROAD COMPANY. (No. 560.)

SAME

v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY. (No. 561.)

SAME

v.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY. (No. 562.)

SAME

v.

PENNSYLVANIA RAILROAD COMPANY. (No. 563.)

SAME

v.

LEHIGH VALLEY RAILROAD COMPANY. (No. 564.)

UNITED STATES, Appt.,
v.
DELAWARE & HUDSON COMPANY. (No. 565)

SAME
v.
ERIE RAILROAD COMPANY. (No. 566.)

SAME
v.
CENTRAL RAILROAD COMPANY OF NEW JERSEY. (No. 567.)

SAME
v.
DELAWARE, LACKAWANNA ,& WESTERN RAILROAD COMPANY. (No. 568.)

SAME
v.
PENNSYLVANIA RAILROAD COMPANY. (No. 569.)

SAME
v.
LEHIGH VALLEY RAILROAD COMPANY. (No. 570.)

Statutes—construction—favoring constitutionality.

1. In construing a statute reasonably susceptible of two interpretations, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, it is the court's duty to adopt the latter intrepretation.

Carriers — governmental control — association with commodity carried.

2. The dissociation of railway companies prior to transportation from the articles or commodities transported, whether such association results from manufacture, mining, production, or ownership, or interest, direct or indirect, is the common purpose of the provisions of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

Carriers — governmental control — association with commodity carried.

3. Transportation when the thing to be transported has been manufactured, mined, or produced by the carrier or under its authority, and at the time of transportation the carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the thing to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, is all that is forbidden by the provisions of the Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

Carriers — governmental control — interest in commodity carried — stock ownership.

4. The ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or owning the commodity carried is not the "interest, direct or indirect," in such commodity, forbidden to the carrier by the Hepburn act of June 29, 1906, but such words are to be taken as embracing only a legal or equitable interest in the commodities to which they refer.

Commerce — regulation of interstate carrier — association with commodity carried.

5. Congress could properly enact, as a regulation of commerce, so much of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier, or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, although, by existing state legislation, such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate.

Constitutional law — due process of law — governmental regulation of carrier.

6. Railway companies enjoying the right, under existing state legislation, of ownership of or association with the articles or commodities carried, are not denied the due process of law guaranted by U. S. Const. 5th Amend. by so much of the provisions of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles or

commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense.

Commerce — congressional regulation — discrimination.

7. The exception in favor of timber and manufactured products thereof, contained in the provisions of the Hepburn act of June 29, 1906, forbidding railway carriers from transporting in interstate commerce articles or commodities with which they are associated, or in which they are interested, does not render the statute invalid for discrimination.

Statutes — when validity may be assailed.

8. The Federal Supreme Court will not consider the question of the constitutionality of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought.

Statutes — invalid in part.

9. The possible invalidity of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested cannot affect

the validity of these provisions, since the penalty clause is wholly separable therefrom.

Carriers — governmental regulation — what is a railway company.

10. The Delaware & Hudson company, chartered to secure coal lands and mine coal, and to construct a canal and railroad for the purpose of transporting the products of its mines, being also engaged as a carrier by rail in the transportation of coal in the channels of interstate commerce, is a "railroad company" within the meaning of the Hepburn act of June 29, 1906, prohibiting such companies from transporting in interstate commerce commodities with which they are associated, or in which they are interested.

[Nos. 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570.]

Argued January 19, 20, 1909. Decided May 3, 1909.

SIX WRITS OF ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review judgments denying mandamus to compel certain railway carriers to refrain from interstate transportation of coal from the Pennsylvania anthracite regions. Reversed and remanded for further proceedings. Also

SIX APPEALS from the Circuit Court of the United States for the Eastern District of Pennsylvania to review decrees dismissing bills in equity seeking to accomplish the same result by injunction. Reversed and remanded for further proceedings.

See same case below, 164 Fed. 215.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

Mr. Justice White delivered the opinion of the court:

We dismiss for the present a contention made by one of the corporations, that it is not a railroad company within the meaning of that term as used in the statute, which we shall have occasion to consider, because it is merely a coal company, whose transporting operations are but incidental to its mining operations. With this contention put aside, it is true to say, speaking in a general sense, that the corporations, parties to this record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other states. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines, and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads, not only owned but also leased and operated coal mines, and carried the coal produced from such mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal so produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for persons to whom the coal had been

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sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the

case as to some of the railroad companies who, as we have previously stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been possessed by them for a long time, and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other states, in which the companies likewise, in part, carried on their business. We insert in the margin a summary which the court below made concerning the situation of the respective corporations, taken from the answer or return made by each corporation.†

† It is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and, in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interests possessed by them in the coal so transported, or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware & Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated by an act of the legislature of the state of New York, April 23, 1823 . . . and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson river in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the legislature of the state of Pennsylvania, between the years of 1823 and 1871, and that these acts of the state of Pennsylvania resulted from the desire and policy of said state to create and foster the industry of mining such coal and developing the transportation thereof; that, under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the state of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware river to the Hudson river; that later, under statutes of both states, it invested additional capital in the construction of railroads in the state of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the state of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be

paid, not only for those mining lands, but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it; viz., the Northern Coal & Iron Company, the Jackson Coal Company, and the Hudson Coal Company; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company; and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware & Hudson Company, that this said "commodities clause" does not apply to it, because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes, as thereafter stated), "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal."

(2) The answer of the Erie Railroad Company states that it was originally organized under the laws of the state of New York in 1832 . . . that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities, and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the states of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838 . . . its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 . . . the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857 . . . 1864 . . . 1867 . . . and 1868 . . . ; that in pursuance of these various acts of the legislature, the Pennsylvania Coal

Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the state of Pennsylvania in 1869 . . . for the purposes and with powers similar to those of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania the said Erie Railroad Company, long prior to the passage of the said amendment to the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that, for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the state of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect, therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the state of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the state of Pennsylvania, one of which, approved April 15th, 1869 . . . was entitled "An Act to Authorize Railroad and Canal Companies to Aid in the Development of Coal, Iron, Lumber, and Other Material Interests of This Commonwealth;" that, pursuant to the authority of these several acts, it had, long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkesbarre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkesbarre Coal Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than $1,414,400, and not to exceed $2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to $9,812,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna, & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal

lands and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849 . . . that all the lines of railroad owned by it are wholly within the state of Pennsylvania, extending from the Delaware river, at the boundary line of the state of New Jersey, in a northwesterly direction across the state of Pennsylvania to the boundary line between the state of Pennsylvania and the state of New York, with a branch line extending from Scranton, in the state of Pennsylvania, to Northumberland, in said state. Said defendant also admits and alleges that, under express authority of acts of the legislature of the states of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and, long prior to May 1st 1908, has operated, various lines of railroad in the two last-mentioned states, by which it has direct traffic connection with the city of Buffalo and other cities in the said states. Defendant also admits that for many years it has owned in fee extensive tracts of coal land in the state of Pennsylvania; that it has also leased large tracts of coal land in the said state, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom, has been, and continues to be, under and by virtue of the authority of the laws of the state of Pennsylvania.

That, in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said state of Pennsylvania, have been merged into said defendant corporation; that, by an act of the general assembly of the state of Pennsylvania, approved April 15th, 1869, entitled, "An Act to Authorize Railroad and Canal Companies to Aid in the Development of the Coal, Iron, Lumber, and Other Material Interests of This Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That, by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes, $1,103,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its lands owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other states as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "interstate

commerce act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the state of Pennsylvania April 13th, 1846 . . . that, as early as 1871, under authority of two general statutes of the state of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one third of the shares of the Mineral Railroad Mining Company, corporations of the state of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the state of Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon or so contiguous to the system of railroads operated by said defendant as to render transporation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the state of Pennsylvania. Under the authority of various acts of assembly of the said state, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that, by means of its own and of said leased lines of railroad, it conducts, and for many years had conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York & Middle Coal Field Railroad & Coal Company, a corporation of the state of Pennsylvania; also the entire capital stock of Coxe Bros. & Company a corporation of said state; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority interest of the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the state of Pennsylvania, organized for the purpose of mining coal, some of them more than a half century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the company whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defendant, under which mortgage bonds to the amount of $23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Company, Incorporated, owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of $18,000,000 have been issued under said agreement and are now out standing in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies

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After the first day of May, 1908, the government of the United States commenced these proceedings by bill in equity against each of the corporations, to enjoin each from carrying in interstate commerce any coal produced under the circumstances which we have stated. At the same time a petition in mandamus was filed against each corporation, seeking to accomplish the same result. Both the equity causes and the mandamus proceedings were based upon the assumption that the 1st section of the act to regulate commerce, as amended and re-enacted by the law usually referred to as the Hepburn act, approved June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. C. Comp. Stat. Supp. 1907, p. 892), contained a provision, generally known as the commodities clause which caused it to be illegal for the corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of the modes above stated. Except as we have said, in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities

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whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the state of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of $36,068,431 for the last fiscal year, or $15,110,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependant upon the operation of the mines and collieries of said coal companies, and that, if said defendant were deprived of the earnings derived from the transporation of the coal of said coal companies, its business could not be continued, except at a net loss of many millions of dollars per annum.

clause, they all defended substantially upon the ground, that, when correctly interpreted, the commodities clause did not forbid the interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution, because the right to enact it was not embraced within the authority conferred upon Congress to regulate commerce. In addition it was contended that even if, abstractly considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the 5th Amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws. It was besides insisted that, in any event, the clause was repugnant to the Constitution because of the discrimination caused by the exception as to timber and the manufactured products thereof. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause as having the meaning which the government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject * was at least formally ap-

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proached, but for the purpose of deciding whether inherently the commodities clause was within the compentency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the corporations were found to enjoy as a result of valid state laws. In this aspect the issue which the court deemed it was called upon to determine was thus by it epitomized:

"The fundamental and underlying question, however, which presents itself at the threshold of all the

cases for our consideration, is whether the so-called 'commodities clause' amendatory of the act to regulate commerce, passed June 29, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole, and in relation to the concrete facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized, and the relevant industrial conditions," which, being matters of common

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knowledge, may be judicially noticed."

The situation which it was considered should be kept in mind for the purpose of passing upon the constitutional question was thus stated:

"The general situation is that for half a century or more it has been the policy of the state of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other states. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other states. It is not questioned that, pursuant to this general policy, investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different states

of the Union and Canada for the year 1905 (the last year for which there are authoritative statistics) was 61,410,201 tons; that approximately four fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets and other states and Canada, and of this four fifths, from 70 to 75 per cent was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

"It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any * point where there may be

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a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the Constitution and laws of the state of Pennsylvania, and that their right to the enjoyment of the same has never been doubted or questioned by the courts or people of that commonwealth, but has been fully recognized and protected by both."

It was decided that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce. 164 Fed. 215. A member of the court dissented and expressed his reasons in a written opinion. Without adverting to all the reasoning expounded in that opinion, we think it accurate to say that, in a large and ultimate sense, it proceeded upon the assumption that, as the commodities clause provided, to quote the summing up of the opinion, for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of Congress to enact, and when enacted was operative upon the defendants, and therefore required them

to conform to the regulation, even although to do so might in some way indirectly affect valid rights derived from prior state legislation.

Judgments and decrees were entered denying the applications for mandamus and dismissing the bills of complaint.

The text of the commodities clause upon which the cases depend is as follows:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any

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> interest, direct, or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined, or produced by them or under their authority, or which they own or may have owned, in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined, or produced by a corporation in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the meaning which the government insists should be given to its text, but on the significance of the

text as illumined by what it is insisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced, or owned by them, etc., but moreover to divorce the business of transporting commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing, or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the government: "It (the clause) forbids the carrier who owns the mines and sells coal, to transport that coal in interstate commerce. . . . This is not trifling with the question. It states the exact fact and the reality." And, in accordance with this principle, the insistence in argu-

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ment is that it was the duty of the carriers who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the government: "This is undoubtedly a searching and radical law, and was meant to be so." True, the government, in argument, suggests that the radical result of the statute may be assuaged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which

it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation. Besides, to do so would be repugnant to the asserted spirit and purpose of the statute which lies at the foundation of the construction upon which the government relies.

Let us, as a prelude to an analysis of the clause, for the purpose of fixing its true construction, and determining the constitutional power to enact it when its signifiance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the government is a correct one.

We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the government has placed upon it. We do this because, obviously, mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.

Let it be conceded at once that the power to regulate commerce * possessed by Congress is, in the nature of things,

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ever-enduring, and therefore the right to exert it today, tomorrow, and at all times in its plentitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be, in and of themselves, lawful regulations of commerce, if prospectively applied, nevertheless they cannot

be so considered, because of their retroactive effect upon the rights of the defendants, alleged to have been secured by valid state laws. We further concede, for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although, by existing state laws, the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the government as to the meaning of the commodity clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: 1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production, or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in inter-

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state commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced, or owned them, etc? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide: (a) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the states of the authority to endow a carrier

with the attribute of producing as well as transporting particular commodities,—a power which the states from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several states have been developed, their enterprises fostered, and vast investments of capital have been made possible? (b) Although the government of the United States, both within its spheres of national and local legislative power, has in the past, for public purposes, either expressly or impliedly, authorized the manufacture, mining, production, and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave question thus stated must necessarily, as we have said, arise for decision if the contention of the government, as to the meaning of the commodity clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights

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Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108. And un-

less this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman v. Interstate Commerce Commission, 211 U. S. 407, ante, 253, 29 Sup. Ct. Rep. 115.

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions; that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined, or produced; 2, which have been so mined, manufactured, or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect.

It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining, or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present, and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if, at the time of the transportation, they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this

it follows that the construction which the government places upon the clause as a whole is in direct conflict with the literal meaning * of the prohibitions as ownership

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and interest, direct or indirect. If the first two classes of prohibitions as to manufacturing, mining, or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute a self-annihilative meaning. This is the case, since, in practical execution, it would come to pass that where a carrier had manufactured, mined, and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequences, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal, and buys and sells the coal thus bought to the same person, A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that, as thus

construed, it would lead to the conclusion that it was the intention, in the enactment of the statute, to prohibit manufacturing and production by a carrier, and, at the same time, to offer an incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the govervent, in view of the purpose of Congress to prohibit railroad companies engaged in * interstate commerce from being, at the same

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time, manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions, they should all be construed so as to accomplish the result intended; and therefore their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation and because of the causes stated, irrespective of the particular relation of the railroad company to the commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, cannot be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining, and production from the clause, as ownership in

whole or in part or interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining, and production, if the proposed reconciliation of the conflict between the prohibition be brought about. We think, however, that a brief reference to a ruling of this court concerning the effect of the interstate commerce law prior to its amendment by the Hepburn act, will serve to make clear the unsoundness of the proposition. The case referred to is that of New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 5 L. ed. 515, 26 Sup. Ct. Rep. 272. In that case, after much consideration, it was held that the prohibitions of the interstate commerce * act as to uniformity of rates and against rebates

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operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pp. 399, 400) to refer to rulings of the Interstate Commerce Commission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing, and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in sofar as the requirement of reasonableness of rates was concerned. While referring to those administrative rulings, and declaring that, in view of their long standing, the construction which had been thus given to the act should not be departed

from, "at least, until Congress has legislated on the subject" (p. 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined, or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to disassociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the New York, N. H. & H. R. Co. Case, to assume that the provisions as to manufacturing, mining, and production, while they may be somewhat redundant, were nevertheless expressed * for the purpose of leaving no possible room for

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the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine, and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce. Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is essential to be adopted in order that the statute may have a harmonous operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should

treat the prohibitions as having a common purpose; that is, the dissociation of railroad companies, prior to transportation, from articles or commodities, whether the association resulted from manufacture, mining, production, or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute, we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and, as we think, doubtful prohibitions, so as make them accord with the narrow and more reasonable provisions, and thus harmonize the statute.

Nor is there force in the contention that because the going into effect of the clause was postponed for a period of nearly two years, therefore the far-reaching and radical effects which the government attributes to the clause must have been contemplated by Congress. We think, on the contrary, it is reasonable to infer, in view of the facts disclosed in the statement which we have previously excerpted, that the delay accorded * is entirely consistent with

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the assumption that it was so granted to afford the time essential to make the changes which would be required to conform to the commands of the clause as we have interpreted it, such as providing the facilities for dissociation by sale at the point of production before transportation or segregation by means of the organization of bona fide manufacturing, mining, or producing corporations.

It remains to determine the nature and character of the interest embraced in the words "in which it is interested, directly or indirectly." The contention of the government

that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 588, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the government that, if the clause embraces only a legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined, or produced, or is owned by a corporation in * which the carrier is a stockholder. The

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contention of the government substantially rests upon the assumption that, unless the words be given the meaning contended for, they are without significance. That this is clearly not the case is well illustrated by the New York,

N. H. & H. R. Co. Case, supra. In that case the Chesapeake & Ohio Railway Company it was shown at one time not only directly engaged in buying, selling, and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that, in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured. mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 40 Cong. Rec. pt. 7, pp. 7012-7014. And the considerations just stated, we think, completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense, upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the * statement taken from the answers and

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returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not, in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported, in whole or in part; (c) When the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent; and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New York, N. H. & H. R. Co. Case, to which we have previously referred. We do not say this upon the assumption that, by the grant of power to regulate commerce, the authority of the government of the United States has been unduly limited, on the one hand, and inordinately extended, on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the states of lawful commodities, or to destroy the governmental power of the states as to subjects within their juris-

diction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind,

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the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all pre-existing rights of the railroad companies were subordinated. Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

We think it unnecessary to consider at length the contentions based upon the due process clause of the 5th Amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause, interpreted as the government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that, in substance and effect, the argument really asserts that the clause, as construed by the government, is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappears as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore,

in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so.

Without elaborating, we hold the contention that the clause under consideration is void because of the exception

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as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation, when adopted, should be applied to all commodities alike. It follows that even if we give heed to the many reasons of expedience which have been suggested in argument against the exception, and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.

With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in Ex parte Young—a question which we do not feel called upon to decide,—nevertheless the proposition is without merit, because (a) no penalties are sought to be recovered in these cases, and (b) the question of the constitutionality of the clause relating to penal-

ties wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effor to enforce such penalties be made.

There is a contention as to one of the defendants, the Delaware & Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the states of New York and Pennsylvania, it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines; and, undoubtedly, vast sums of money have been invested in carrying out these

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purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that, by the true construction of its charters, the Delaware & Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause, and subject to the regulations which are embodied therein, as we have interpreted them.

As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that, in view of the public and private interests which were concerned, the

United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it, as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it.

And it is so ordered.

Mr. Justice **Harlan**, dissenting:

As these cases have been determined wholly on the construction of those parts of the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892] which are here in question, and as Congress if it sees fit,

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may meet that construction by additional legislation, I deem it unnecessary to enter upon an extended discussion of the various questions arising upon the record, and will content myself simply with an expression of my nonconcurrence in the view taken by the court as to the meaning and scope of certain provisions of the act. In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured, or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the

purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.

UNITED STATES v. LEHIGH VALLEY R. CO., 220 U.S. 257, 31 Sup. Ct. Rep. 387, 55 L.ed. 458 (1911)

UNITED STATES OF AMERICA, Appt.,

v.

LEHIGH VALLEY RAILROAD COMPANY.

Appeal — discretionary matters — amendment.

1. Abuse of discretion which may be reviewed on appeal is committed by the trial court when it refuses to permit an amendment to the bill in a suit by the Federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they are interested, where such amendment is germane to the original cause of action and was not foreclosed by the decision of the Federal Supreme court, which on appeal, had reversed a prior decree of dismissal founded upon the alleged unconstitutionality of the statute upon which the suit was based, and had remanded the cause for further proceedings.

Pleading — amendments — when germane to original cause of action.

2. A proposed amendment to the bill in a suit by the Federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they are interested is germane to the original cause of action where its allegations tend to show such an exercise by the carrier of its power as a stockholder in the corporation manufacturing, mining, producing, or owning the commodity carried, as to deprive the latter of all independent existence, and to make it vir-

tually but an agency, or dependency, or department of the carrier.

Judgment — res judicata — what matters concluded.

3. An adjudication that the ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or owning the commodity carried is not the interest in such commodity forbidden to the carrier by the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), is not *res judicata* of the right of such carrier to exert its power as a stockholder so as to deprive the other corporation of all real independent existence, and to make it virtually but an agency, or dependency, or department of the carrier.

Carriers — governmental control — interest in commodity carried — stock ownership in sham corporation.

4. The exercise by a railway carrier of its power as a stockholder in a corporation manufacturing, mining, producing, or owning the commodity carried in such manner as to deprive the latter corporation of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier, is forbidden by the provisions of the Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

[No. 536.]

Argued January 5, 1911. Decided April 3, 1911.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania to review a decree

refusing to allow an amendment to the bill, and dismissing a suit by the Federal government to enjoin a railway carrier from interstate transportation of a commodity with which it is associated or in which it is interested. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

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Mr. Chief Justice **White** delivered the opinion of the court:

This case is one of what were known as the Commodity Cases, previously decided and reported in 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527. The controversy now is but a sequel to that disposed of in the previous cases. To understand the question now for consideration it is essential to have in mind the contentions which arose for decision upon the previous appeal and the disposition which was made of them. We therefore refer to those subjects.

The United States proceeded, both by suits in equity and mandamus, against certain railroad companies, including the Lehigh Valley, to prohibit them from transporting coal in interstate commerce in violation of what were deemed to be prohibitions of the fifth paragraph of the 1st section of the act to regulate commerce, as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn act. The clause is as follows:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District

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> of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any art-

cle or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or intended for its use in the conduct of its business as a common carrier." 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150.

In effect, the contention of the government was that the clause in question prohibited railroad companies from moving in the channels of interstate commerce articles or commodities other than the articles excepted by the provision, which had been manufactured, mined, or produced by the companies or under their authority, or which were, at the time of the transportation, owned by them, or which had been previously owned by them in whole or in part, or in which the companies then or previously had any interest, direct or indirect. The government, moreover, insisted that these general propositions embraced the movement by the companies in interstate commerce of a commodity which had been manufactured, mined, or produced by a corporation in which the transporting railroad company was a stockholder, irrespective of the extent of such stock ownership. The railroad companies in effect defended the suits upon the ground that the statute, as construed by the government, was repugnant to the Constitution. Each of the cases was submitted upon bill and answer and petition and return to the circuit court of the United States for the eastern district of Pennsylvania, held by three circuit judges under the expediting act of February 11, 1903, 32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1909, p. 1211. The submission in each case was made as a result of a stipulation between counsel "that the submission on bill and answer and any averment or admission in the pleadings of either party shall in no

wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purpose thereof."

Treating the commodities clause in question as having the significance attributed to it by the United States, the court held it to be repugnant to the Constitution. Judgments and decrees were accordingly entered, denying the applications for mandamus, and dismissing the bills of complaint. The reasons which led to this action were expounded in one opinion, made applicable to all the cases, the court briefly but comprehensively stating the facts in each case which were relied upon by the government as bringing the defendant corporation within the clause as the government construed it. The cases were then brought here.

As was done in the lower court, the cases here were all disposed of by one opinion, the facts in each case as summarized by the court below being stated. In deciding the cases, it became necessary first to ascertain the meaning of the commodities clause. In performing this duty, the conclusion was reached that the clause did not have the far-reaching significance attributed to it by the government, and which had been substantially adopted by the court below, but, on the contrary, had a much narrower meaning. Attention was directed to the fact that the statute disjunctively applied four generic prohibitions; that is, it forbade a railway company from transporting in interstate commerce articles or commodities, 1, which it had manufactured, mined, or produced; 2, which have been so mined, manufactured, or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect. All these prohibitions, however, were held to have but a common purpose, "that is, the dissociation of railroad companies prior

to transportation from articles or commodities, whether the association resulted from manufacture, mining, pro-

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duction, or ownership, or interest, direct or indirect."

In coming to determine whether the government was correct in its contention that these prohibitions operated to prevent a railroad company from transporting a product because it was owned by or had been mined, manufactured, or produced by a corporation in which the railroad company was the owner of stock, irrespective of the amount of such stock ownership, it was expressly decided that the prohibitions of the statute were addressed only to a legal or equitable interest in the commodities to which the prohibitions referred; that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced, or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation.

Summing up its review as to the true construction of the commodities clause, the court held (p. 415) that it prohibited "a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported, in whole or in part; (c) when the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, or produced or owned, etc., by a

bona fide corporation in which the railroad company is a stockholder.

Thus construed, the clause was held to be within the

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power of Congress to enact. As this conclusion rendered it necessary to reverse the action of the court below, which had been exclusively predicated upon the unconstitutionality of the statute, the question arose as to what disposition should be made of the cases. That is to say, the constitutionality of the statute being settled and its true meaning being expounded, the question was whether the cases should be finally disposed of or should be left in such a position as to give the government the right to proceed to apply and enforce the prohibitions of the statute against the various corporations which were defendants, if it deemed a good case existed for so doing. Disposing of this subject in the light of the consent upon which the cases had been tried in the court below, and of the error which had obtained as to the true meaning of the statute, and of the consequent concentration of the attention of the court and of the parties to the question of the constitutionality of the statute, instead of its application to the facts, when correctly construed, it was determined that the decree should not conclude the right of the United States in the respective causes to further proceed to enforce the statute as construed, and hence that that subject should be left open for future action. Referring to this matter, it was said (p.418):

> "As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that, in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these pro-

ceedings with the object and purpose of settling the differences between it and the defendants concerning the meaning of the commodities clause and the power of Congress to enact it, as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that

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the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we interpreted it."

Accordingly, the mandate of this court provided that the cause "be, and the same is hereby, remanded to the said circuit court for further proceedings in conformity with the opinion of this court."

Upon the filing of the mandate, the court below vacated its decree dismissing the bill in this (the equity) cause, and reinstated the case upon the docket. The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the actual relations existing between the railroad company and one of the coal companies mentioned in the original bill, *viz.*, the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company, the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence, and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere

device to enable the railroad company to violate the provisions of the commodities clause. It was expressly charged that in consequence of these facts:

> "The coal company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of* and has a pecuniary interest in the coal
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>
> mined by the coal company, and which is transported by the defendant."

Not only was it thus charged that the railroad company used its stock ownership to so commingle the operating of the affairs of the mining company with its own as to render it impossible to distinguish as a matter of fact between them, but it was moreover expressly in substance charged that, exerting its influence as the owner of all the stock of the coal company, the railroad company caused the coal company to buy up all the coal produced by other mining areas in the area tributary to the railroad, and fixed the price at which such coal was bought, so as to control the same and the transportation thereof, and establish the price at which the coal thus ostensibly acquired by the coal company by purchase should be sold when it reached the seaboard.

It was charged that by these abuses the production, shipment, and sale of all the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows:

> "That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the opera-

tions of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"First. That the coal company, not being in substance and in good faith a bona fide corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect,

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in a legal or equitable sense, in said coal.

"Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant, at the time of transportation and before the act of transportation, has not in good faith dissociated itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation, and over the subsequent sale thereof."

On the objection of the railway company, the court denied the request of the United States for leave to file the amended bill. The United States then moved for a decree dismissing its original bill without prejudice, and after argument that motion also was denied. Thereupon counsel for the railroad company moved to dismiss the bill absolutely, and upon the statement of counsel for the United States that it "would not proceed any further, in view of the fact that the proposed amendment had been disallowed," the court reached the conclusion "that the bill should be dismissed absolutely upon the allegations of the bill and answer." A decree to that effect was entered, and the government prosecutes this appeal, relying for reversal upon the error which it is insisted was committed in refusing to allow the proposed amended bill to be filed, and in dismissing the suit.

At the threshold it is insisted by the railroad company that the action of the court below in refusing to permit the proposed amendment, however germane that amendment

may have been to the cause of action stated in the original bill, and even although the subject-matter of the amendment was not foreclosed by our previous decision, is not susceptible of being reviewed, because the allowance of amendments to pleadings is discretionary with a trial court, and the action of the court below in refusing to permit the amendment, even though erroneous, may not be reversed for error unless a gross abuse of discretion was

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committed. The principle is elementary, but is inapplicable to this case for a twofold reason: First, because the analysis which we have hitherto made of the opinion of this court on the prior hearing makes it certain that the undoubted object was not to foreclose the right of the government to enforce in the pending causes the commodities clause as correctly construed, and therefore in this regard the discretion of the court before was controlled by the action of this court. Second, because, in view of the express reservations in the opinion and the explicit language of the mandate of this court, the conclusion cannot be escaped that an absolute abuse of discretion resulted from refusing to permit the amendment, even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate.

It remains only to consider, first, whether the proposed amendment was germane to the original cause of action, and if it was, whether it was foreclosed by our previous decision.

As to the first question. When it is borne in mind that the suit was brought by the government to enforce as against the defendant the commands of the commodities clause, the fact that the proposed amendment was germane to such cause of action is too apparent to need anything

but statement. Indeed, in the argument at bar on behalf of the railroad company this is in effect conceded, since it is insisted that the amendment should not have been allowed, because in substance its averments virtually constituted part of the original cause of action. And we think it is equally clear that the grounds of the amendment were not foreclosed by our former decision. While that decision expressly held that stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured,

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mined, produced, or owned by such corporation, nothing in that conclusion foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned, or produced by a corporation in which the railroad held stock, and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so expected, because any control which is exerted or interest

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which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a bona fide exercise of such ownership, and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation, for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company was a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in effect urged as the railroad company held all the stock in its coal company, and therefore any gain made

or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate judicial beings, because, ultimately, considered, they were but one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership,—particularly to a case where the ownership embraced all the stock of a producing company,—and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this

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duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest, not to abuse such power so as virtually to do by indirection that which

the commodities clause prohibits,—a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable.

Deciding, as we do, that error was committed in denying leave to file the proposed amended bill, the decree below is reversed and the cause remanded with directions for further proceedings in conformity with this opinion.

DELAWARE, LACKAWANNA AND WESTERN R. CO. v. UNITED STATES
231 U.S. 363, 34 Sup. Ct. Rep. 65, 58 L.ed. 269 (1913)

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

No. 275. Argued October 17, 1913.—Decided December 1, 1913.

The commodity clause of the Hepburn Act applies not only to the carrier's goods from the point of production to the market but also to goods from market to that point.

While the power to regulate interstate commerce is subject to the provisions of the Fifth Amendment, an enactment, such as the commodity clause, which does not take property or arbitrarily deprive the carrier of a property right, does not violate that Amendment.

In dealing with interstate carriers, the fact that some of them are also engaged in private business does not compel Congress to legislate concerning them as carriers in such manner as not to interfere with such private business.

The commodity clause is general and applies to all shipments, even if innocent in themselves, which come within its scope; its operation is not confined to particular instances in which the carriers might use its power to the prejudice of shippers. Supplies, purchased for use in operating a carrier's mines, 75 per cent of the product of which

is intended for sale and only 25 per cent intended for the carrier's own use, are not necessary for the conduct of its business as a carrier and fall within the prohibition of the commodity clause of the Hepburn Act.

Although the purchaser may have the right to rescind for a condition subsequent, title may pass on delivery; and so *held* in this case that title to hay purchased by, and delivered to, a railroad company, passed to it although payment was postponed until after inspection and acceptance.

THE facts, which involve the construction of the Commodities Clause of the Hepburn Act of June 29, 1906, are stated in the opinion.

[Appearances and summaries of arguments omitted.]

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MR. JUSTICE LAMAR delivered the opinion of the court.

The Delaware, Lackawanna & Western Railroad Company was indicted for hauling, over its lines, between Buffalo, New York, and Scranton, Pennsylvania, twenty carloads of hay, belonging to the Company, but not necessary for its use as a common carrier. This transportation

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was charged to be in violation of the Commodities Clause of the Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 585, which makes it unlawful "for any railroad company to transport in interstate commerce any article . . . it may own . . . or in which it may have any interest . . . except such . . . as may be necessary . . . for its use in the conduct of its business as a common carrier."

On the trial it appeared that the defendant was not only chartered as a Railroad, but had also been authorized to operate coal mines. The hay, referred to in the indictment,

had been purchased for the use of animals employed in and about the mines at Scranton—all the coal taken therefrom being sold for use by the public, except the steam coal which was used as fuel for the Company's locomotives.

The defendant was found guilty and sentenced on each of the twenty counts. It brought the case here, insisting that the Commodities Clause violated the Fifth Amendment; deprived the Company of a right to contract, and prevented it from carrying its own property needed in a legitimate intrastate business, conducted under authority of a charter granted by the State of Pennsylvania, many years before the adoption of the Hepburn Bill.

1. This contention must be overruled on the authority of *United States* v. *Delaware &c. Co.*, 213 U. S. 366, 416. It is true that the decision in that case related to shipments of coal from mine to market, while here the merchandise was transported from market to mine. But the statute relates to "all commodities, except lumber, owned by the Company" and includes inbound as well as outbound shipments. Both classes of transportation are within the purview of the evil to be corrected and, therefore, subject to the power of Congress to regulate interstate commerce. The exercise of that power is, of course, limited by the provisions of the Fifth Amendment. (*Monongahela*

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Co. v. *United States*, 148 U. S. 312, 336; *McCray* v. *United States*, 195 U. S. 27; *Union Bridge Co.* v. *United States*, 204 U. S. 364), but the Commodities Clause does not take property nor does it arbitrarily deprive the Company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier

hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered. The Commodities Clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the Company occupied the dual and inconsistent position of public carrier and private shipper.

It was suggested that the case is not within the statute because, as the Company could buy, in Scranton, hay that had already been transported over its line, no possible harm could come to anyone if it brought the same hay at Buffalo and then hauled it to Scranton for use at the mine, but not for sale in competition with other dealers in stock food. But the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented.

2. In this case the hay was purchased for use in operat-

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ing mines where 75 per cent. of the coal produced was "assorted sizes" intended to be sold for domestic purposes. The remaining 25 per cent was steam coal—all of which was used as fuel on the Company's locomotives. This steam coal was in the nature of a by-product from a mine operated primarily for the purpose of obtaining coal for sale. Hay purchased for the use in such mining cannot be

said to have been necessary for the use of the Company in the conduct of its business as a common carrier.

3. Lastly, it was contended that the hay did not belong to the Railroad Company at the time of the transportation and, therefore, the conviction should be set aside since the statute only prohibits the hauling of commodities owned by the carrier.

This contention is based upon the terms of the contract, by which the Vassar Company, of Millington, Michigan, agreed to sell to the Railroad Company 3,000 tons, No. 1 timothy hay, at $15.40 per ton, f. o. b. Buffalo, payment to be made as follows: Upon the delivery of the hay to the purchaser, at Buffalo, same will be transported by the purchaser to various points on its line of railroad to be determined by the purchaser, at which places the purchaser shall have the right to inspect such hay before acceptance, and if upon such inspection said hay shall prove to be of the kind specified, the purchaser shall accept such hay and pay for the same within 30 days after such acceptance. Each of the twenty carloads of hay mentioned in the indictment was received by the Company at Buffalo. Each was then reconsigned to itself at Scranton. The waybills were marked "Freight free—Co. use." After arrival at Scranton it was inspected, accepted and used.

On these facts the defendant insists that the title did not pass until after acceptance, and many authorities are cited to support the proposition that, in a contract for the sale of personal property not only delivery by the

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seller, but acceptance by the buyer, is necessary for the transfer of title. But there are two kinds of acceptance—one of quality and the other of title. They are not necessarily contemporaneous. There may be an acceptance of quality before delivery, as where goods are selected by

the purchaser—delivery and transfer of title being postponed until a later time. Or, there may be an acceptance of title without an acceptance of quality; so that in many cases, after the title has passed, the purchaser may recover damages if the goods, upon inspection, prove to be of a quality inferior to that ordered. *Day* v. *Pool*, 52 N. Y. 416; *Zabriskie* v. *Central R. R.*, 131 N. Y. 72; *Bagley* v. *Cleveland Co.*, 21 Fed. Rep. 159 (3), 164; *Miller* v. *Moore*, 83 Georgia, 684. Again, though there may be such an acceptance as will transfer the title, the purchaser may, under the contract, have the right to rescind, as for a condition subsequent, if the goods do not correspond with the specifications. Such was the case here. When the hay was received by the purchaser at Buffalo there was such an acceptance as to transfer title to the Railroad, which accordingly took possession and exercised control in fixing when and to what point on its line the hay should be shipped. Title *prima facie* passes when delivery is made and if such possession followed by acts of ownership did not transfer the title to the Railroad Company, it left the risk of unknown dangers, at unknown points, for an indefinite time, upon the seller. So hard and unusual an incident is not, under facts like these, necessarily to be implied from the use of the ambiguous phrase, "pay after inspection and acceptance," and no such construction should be given unless demanded by the explicit terms of the contract. The parties, by their conduct, showed that they did not understand that the hay remained the property of the seller after it had been delivered to the buyer, for the hay after being received was consigned by the Company to itself and went

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forward from Buffalo to Scranton on waybills containing the entry "Freight free—Company use." If the hay did, in fact, then belong to the Vassar Company, such a shipment on such a waybill would have been a departure from the published tariff, contrary to the provisions of the Act

to Regulate Commerce. No such offense however was committed, for the contract, both by its terms and in the light of the conduct of the parties, meant that the title should pass when delivery was accepted by the defendant at Buffalo, but that the Railroad Company might rescind if, on later inspection, the quality was found to be different from what had been described in the contract of sale. But after such delivery and before such rescission, the title was in the Railroad Company. *Allen* v. *Maury*, 66 Alabama, 10; *Burrows* v. *Whitaker*, 71 N. Y. 291; *Kuppenheimer* v. *Wertheimer*, 107 Michigan, 77. As the hay belonged to the defendant and was intended for use in its private business of mining, the transportation over its lines, in interstate commerce, was a violation of the Commodity Clause.

Judgment affirmed.

UNITED STATES v. DELAWARE, LACKAWANNA AND WESTERN R. CO.,

238 U.S. 516, 35 Sup. Ct. Rep. 873, 59 L.ed. 1438 (1915)

UNITED STATES *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 517. Argued December 9, 10, 1914.—Decided June 21, 1915.

A railroad corporation engaged at the time of the passage of the Hepburn Act in the business of mining, buying, transporting and selling coal, in order to divest itself of title after the coal had been mined and before transportation began, caused a coal company to be incorporated having stockholders and officers in common with itself; thereupon the two corporations having a common management entered into a contract prepared by the railroad company under which the railroad company did not go out of the mining and selling business, but when the coal was brought to the surface it lost title by sale to the coal company f. o. b. the mines and instantly as carrier regained possession and retained it until delivery to the coal company which subsequently paid the contract price; the price paid was a fixed percentage of the price at a stated terminal on the day of delivery at the mines, and the railroad agreed to sell all of the coal it produced or purchased from others to the coal company and the latter company agreed to buy only from the railroad company and subject to the contract; the stockholders of the railroad company were allowed to take *pro rata* the stock of the coal company and practically all availed of the option, and the coal company declared a dividend on each share of stock sufficient to pay for the amount of stock allotted to the holder thereof. In

a suit brought by the Government alleging that the two corporations were practically one and that the contract was invalid, *held* that:

The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent position of public carrier and private shipper; and, in order to separate the business of transportation from that of selling, the statute made it unlawful for the carriers to transport in interstate commerce any coal in which the carrier had any interest, direct or indirect.

It is not improper for a carrier engaged in mining coal to institute the organization of a coal company to buy or produce the coal so as to comply with the terms of the Commodity Clause and to give its stockholders an opportunity to subscribe to the stock, but it must dissociate itself from the management of the coal company as soon as the same starts business.

Mere stock ownership by a railroad company or by its stockholders in a producing company is not the test of illegality under the Commodity Clause but unity of management and *bona fides* of the contract between the carrier and the producer.

The Commodity Clause and the Anti-trust Act are not concerned with the interest of the parties, but with the interest of the public; and if a contract between a carrier and a producer is as a matter of law in restraint of trade, or if the producing company is practically the agent of the carrier, the transportation of the article produced by the carrier is unlawful.

The contract in this case enables the railroad company to practically control the output, sales and price of coal and to dictate to whom it should be sold and as such is illegal under both the Commodity Clause and the Anti-trust Act.

In order to comply with the Commodity Clause in regard to the transporation of coal a carrier engaged also in mining coal must absolutely dissociate itself from the coal before the transportation begins, and if it sells at the mouth of the mine, the buyer must be absolutely free to dispose of it and have absolute control, nor should a carrier sell to a corporation managed by the same officers as itself—that is contrary to the policy of the Commodity Clause.

While there might be a *bona fide* and lawful contract between a carrier mining coal and a buying company by which the latter buys all of the coal of the former, the contract to be not illegal must leave the buyer free to extend its business elsewhere as it pleases and to otherwise act in competition with the carrier.

213 Fed. Rep. 240, reversed.

Statement of the Case.

THE appellee was chartered not only as a Railroad Company, but was authorized to mine and sell coal. The Commodity Clause of the Hepburn Act of 1906 made it unlawful for the carrier to haul its own coal beyond the limits of the State of Pennsylvania, and desiring to continue the business of mining and transporting coal, the Railroad adopted a plan under which it was to make a sale and divest itself of title to the coal, at the mouth of the mines, before transportation began. Accordingly it caused to be incorporated, under the laws of New Jersey, the Delaware, Lackawanna and Western *Coal* Company with a capital stock of $6,800,000,—divided into shares of $50 each. The Railroad Company then invited its own stockholders to subscribe to the capital stock of the Coal Company at the rate of one share of the latter for each four shares of the former. Ninety-nine per cent. of these stockholders did, as was expected, subscribe for the stock of the Coal Com-

pany—their subscriptions being paid for in full out of a cash dividend of $13,600,000 previously declared by the Railroad Company. The new corporation was then organized by electing the Vice-President of the Railroad Company as President of the Coal Company and other officers and directors of the Coal Company were also officers and directors of the Railroad Company.

As soon as the organization was completed, the Railroad Company prepared and submitted to the Coal Company a contract by which the Railroad Company reserving what it needed for its railway locomotives 'agreed to sell and the Coal Company agreed to buy, f. o. b. the mines, all coal which, during the term of the contract, the Railroad Company should produce from its own mines or purchase from any one else.' The price for prepared sizes—the more important commercial coal—was fixed at 65 per cent. of the price in New York on the day of delivery at the mines. The Railroad Company also leased to the Coal Company all its trestles, docks and shipping facilities.

The contract—thus prepared by the Railroad Company—was then signed by both corporations and, on August 2, 1909, the Coal Company took possession of the leased property; those who had been Agents of the Railroad in its Sales Department became Agents of the Coal Company in its Sales Department and the two corporations, with managing officers in common, also had offices in common in the City of New York.

Thereafter the Railroad Company continued its mining business, annually producing about 7,000,000 tons and purchasing about 1,500,000 tons from operators whose mines were located on its railway. After retaining what was needed for use on its railway engines, it sold the balance, aggregating about 7,000,000 tons, to the Coal Company at the contract prices f. o. b. the mines. The coal thus sold by the Railroad Company was then transported by the

Railroad Company to destination where it was delivered to the Coal Company which paid the regular tariff freight rate and the contract prices on the 20th of each month. This course of dealing continued until February, 1913, when the Government filed a Petition, against both corporations, alleging that the two were practically one and attacking the validity of the contract.

The Petition alleged that the coal business was extremely profitable and in order to continue it, in all its branches, the Railroad Company (which was controlled by a group of 25 persons, owning a majority of its stock), had determined "to cause the organization of a new corporation to be under their own control—whose stockholders would be substantially the same as those of the Railroad Company—and through it to conduct the business theretofore carried on by the Railroad Sales Department, thus securing, in effect, the continued unity of mining, transporting and selling, in substance, as theretofore and depriving the public of the benefits which the Commodity Clause was intended to produce."

The Petition alleged that when the contract was made, in August, 1909, the stockholders of the two corporations were practically identical; that a large majority of the stock in both is still owned by the same persons and that by virtue of the terms and provisions of the contract the Railroad had such an *interest* in the coal as to make it unlawful for it to transport such commodity in interstate commerce.

It was further charged that the transportation of the coal sold to the Coal Company was not only a violation of the Commodity Clause, but that the contract tended to create a monopoly and unlawfully to hinder and restrain trade in coal in violation of the provisions of the Anti-Trust Act. In this connection it was also charged that the Railroad Company not only mined coal, but purchased

the product of other mines located along its railway and had acquired the output of other collieries on its line, giving to it the disposition of more than 90 per cent. of the market, with power to arbitrarily fix prices. The Petition averred:

"By reason of the arrangements described, the support of the Railroad Company, and the peculiar advantages and facilities acquired, the Coal Company at once secured and has ever since maintained an unlawful monopoly of the sale of coal produced along defendant's railroad, and has completely dominated the markets at all points thereon not reached by any other railroad. Its position, power, and support render effective competition with it practically impossible, and the monopoly which it now holds will continue indefinitely unless restrained."

Both defendants answered. There was practically no dispute as to the facts, though both corporations contended that the facts alleged and proved did not support the legal conclusions sought to be drawn therefrom by the Government. Each insisted that the two corporations were separate in law and in fact; contended that the Railroad Company had no interest in the coal and insisted that the Coal Company acted independently of the Railroad Company and was not subject to its control.

At the hearing there was evidence that at the date of the making of the contract all except 2,249 shares in the Coal Company were held by those who held stock in the Railroad Company. By reason of sales of both stocks, it appeared that in October, 1913, 88,116 shares of the Railroad stock were held by those who were not then interested in the Coal Company and 6,907 shares of stock in the Coal Company were held by those who were not owners of the Railroad stock.

There was also evidence that many of the officers of the Coal Company were not officers of the Railroad Com-

pany; that the management of the two corporations was separate and distinct; that the Coal Company kept its own books, deposited its funds in its name in banks of its own choosing, and that the profits went solely to its own stockholders. The Coal Company paid the same rates of freight and demurrage as other shippers and received no discriminating favors from the Railroad Company. In 1910 the amount paid to the Railroad for the purchase price of coal under the contract was about $20,000,000, and for the freight thereon about $14,000,000. Since the contract was made the Coal Company has bought coal from other persons, the quantity being 3,347 tons in 1909; 2,267 tons in 1910; 6,600 tons in 1911; 92,004 tons in 1912; 310,645 tons in the first ten months in 1913.

There are about 70,000,000 tons of anthracite coal produced annually of which 20,000,000 tons are sold at tidewater. Of the 7,000,000 tons sold by the Delaware, Lackawanna and Western Railroad Company about 2,000,000 tons are transported to tidewater points and of this 500,000 tons are prepared sizes. The Coal Company at large expense bought land, built trestles and storage facility at various points in addition to those leased to it by the Railroad Company.

The District Court held that the business of the two corporations had not been so commingled as to make their affairs indistinguishable; that they are two distinct and separate legal beings actually engaged in separate and distinct operations and that the Railroad does not own the coal, either in whole or in part, during its carriage but has in good faith dissociated itself therefrom before the beginning of the act of transportation.

In answer to the claim that 'the Railroad will be the gainer from a high price at tide, since this will necessarily increase the price at the mines and therefore that this interest in the price is such an interest in the coal itself as is condemned by the statute,' the court said: "Un-

doubtedly it is correct to say that the Railroad has an interest in the price, but that 'interest' merely means that the Railroad will gain by a higher price at tide and does not mean that the Railroad has power to control the coal or the price for which it sells." The alleged power to increase the price by increasing the freight was held to be ineffective because freight rates were controlled by the Commerce Commission. "The Railroad Company does not fix prices. It does not decide how much coal is to go to New York Harbor, and it does not determine the sum for which the coal is to be sold at that point." 'The 65 per cent. basis had its origin many years ago and affords a convenient basis for calculating the price to be paid for future deliveries.' . . . The Railroad retains nothing more after the title passes to the Coal Company at the mines than an interest in the price and this is not the same thing as an interest in the coal. The Commodity Clause deals with an "interest direct or indirect" in the commodities themselves and this must mean some kind or degree of ownership in the thing transported or some power to deal with it or to control it. The Railroad Company neither owns nor controls the coal after it has been loaded on the cars at the breakers. Thereafter the Coal Company is the owner and the master, and fixes prices, routes and destination at its own will.

The court further said that 'the bill of complaint makes a formal charge against both defendants under the Anti-Trust Act, but the oral argument left us under the impression that this charge was not much insisted on. For that reason the Anti-Trust Branch of the complaint was regarded as comparatively unimportant, and for that reason we shall not undertake what we think would be the needless task of discussing the evidence bearing upon the charge of restraining or monopolizing commerce. If we are mistaken in this supposition the error can easily be corrected.'

The Petition was thereupon dismissed without prejudice to the Government's right to begin a second proceeding whenever it may be so advised. 213 Fed. Rep. 240. The Government then brought the case here by appeal.

In the Government's brief it is stated that while it did not now ask for a ruling as to the right of the Railroad Company to purchase and sell coal produced in mines along its Railroad, it did ask that if the decree was affirmed it should be without prejudice to the right of the United States to institute such proceedings.

[Appearances and summaries of arguments omitted.]

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Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court.

The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper; and, in order to separate the business of transportation from the business of selling, that statute made it unlawful for railroads to transport in interstate commerce any coal in which the company had "*any interest, direct or indirect.*"[a] *United States* v. *Delaware & Hudson*, 213 U. S. 415; *Delaware &c. R. R.* v. *United States*, 231 U. S. 363, 371.

As will be seen from the statement of facts, the Delaware, Lackawanna and Western Railroad Company was at the time of the passage of the Hepburn Act of 1906, one of the great coal roads engaged in the fourfold busi-

[a] "From and after May 1, 1908, it shall be unlawful for any railroad company to transport" [in interstate commerce] "any article or commodity other than timber . . . manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." 34 Stat. 585.

ness of mining, buying, transporting and selling coal. As the Commodity Clause made it unlawful to transport its own coal to market, the Railway Company decided to adopt a plan by which to divest itself of title after it had

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been mined but before transportation began. It thereupon caused a Coal Company to be incorporated having stockholders and officers in common with the Railroad Company. The two corporations, thus having a common management, then made a contract—prepared by the Railroad Company—under which the Railroad Company did not go out of the mining and selling business, but when the coal was brought to the surface the Railroad Company lost title by a sale to the Coal Company f. o. b. the mines and instantly regained possession as carrier. It retained that possession until delivery to the Coal Company, which subsequently paid therefor at the contract price.

The District Court held that it was illegal for the same person to own a majority of the stock in the two corporations and that their contract of sale was lawful.

From the decree, dismissing the Bill, the Government appealed to this court where much of the argument was directed to the question as to whether the fact that the two corporations had practically the same shareholders left the Railroad Company in a position where it could lawfully transport coal which it had sold at the mouth of the mine to the Coal Company.

1. But mere stock ownership by a Railroad, or by its stockholders, in a producing Company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in

coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such Road to transport coal belonging to such Company. The amendment, however, was voted down; and, in the light of that indication of Congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful

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for a railroad comany to transport coal belonging to a Corporation in which the Road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414. For a stronger reason, it would not necessarily be illegal for the Road to transport coal belonging to a Corporation whose stock was held by those who owned the stock of the Railroad Company.

Nevertheless, the Commodity Clause, of the Hepburn Act of 1906, rendered unlawful many transactions which prior to that time had been expressly authorized by the statutes of the States which had chartered the Coal Roads. And, while the Hepburn Act provided that, in the future, interstate railroads should not occupy the dual position of carrier and shipper, there was, of course, no intent on the part of Congress to confiscate property or to destroy the interest of the stockholders. But, still, upon adoption of the Commodity Clause, this appellee Railroad was confronted with a difficult situation. To shut down the mines, because the coal could not be transported, would have meant not only a vast monetary loss to the Company and its stockholders, but would have been even more harmful to the interests of the public which required a constant supply of fuel. The character of coal property was such as to make it impossible to divide the same in kind among the railroad stockholders, while the value of the coal land was so great as to make it impracticable to find a purchaser in ordinary course of trade. It was, therefore, natural, if not necessary, to organize a corporation with which a

contract could be made, and out of cash received or stock issued to pay for or preserve the equity which the railroad shareholders had in the coal.

In this situation there may have been no impropriety in the Railroad Company taking the preliminary steps of organizing such a corporation. Neither was it illegal for the stockholders of the Railroad Company to take stock in the Coal Company, for there are many instances

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in which the law recognizes that there may be diversity of corporate interest even when there is an identity of corporate members. A city and the county, in which it is located, may both have the same population but different corporate interests. Many private corporations have both stockholders and officers in common, yet they may nevertheless make contracts which will bind both of the separate entities. But whenever two such companies, thus owned or managed, make contracts which affect the interest of minority stockholders, or of third persons, or of the public the fact of their unity of management must be considered in testing the validity and *bona fides* of the contracts under review.

2. That principle is to be specially borne in mind in the present case. For this is not an instance of a Coal Road and a Coal Company, both of which existed and had made contracts prior to the Commodity Clause;—but a case where a Coal Company was created with the express purpose that, with stockholders in common, it should be a party to a contract intended to enable the Railroad Company to meet the requirements of the Commodity Clause and at the same time continue the business of buying, mining, selling and transporting coal.

It is also to be noted that the Delaware, Lackawanna and Western Railroad Company did not part with title

to its coal lands, mines and mining machinery as seems to have been done, on terms not fully stated [*United States* v. *Delaware & Hudson*, 213 U. S. 366, 398 (5), 392], in some of the instances discussed in the Commodity Cases. In them the ownership of the mines had passed completely from the railroads to the producing companies and the coal property was no longer subject to the debts of the railroad companies. After such sale of the coal lands there was both a technical and a practical separation of the legal interest of the two corporations in the coal under the ground, on the surface, when it was transported, and

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when it was sold. The fact that the Railroad held stock in the producing company, and received dividends thereon, did not give to the Railroad Company, any more than to any other stockholder in any other corporation, a legal interest in the property of the Coal Company. Nor would the fact that the Railroad Company had once owned it, have made any difference, if,—by a normal and *bona fide* sale at the point of production,—the carrier had lost all power of control and all right, title and interest in the coal before the transportation began. *United States* v. *Delaware & Hudson*, 213 U. S. 413, top.

3. But the decisions construing the statute, recognize that one corporation can be an agent for another corporation and that by means of stock ownership one of such companies may be converted into a mere agent or instrumentality of the other. *United States* v. *Lehigh Valley R. R.*, 220 U. S. 257, 273. And, this use of one by the other—or this power of one over the other—does not depend upon the control by virtue of the fact that stock therein is held by the Railroad Company or by its shareholders. For dominance of the Coal Company may be secured by a carrier (*New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 363) not only by an express contract of agency,

but by any contract which in its practical operation gives to the Railroad Company a control or an "interest, direct or indirect" in the coal sold, at the mouth of the mines.

Assuming then that the incorporation and organization of the Coal Company under the auspices of the Railroad Company was legal; assuming that the election of railroad officers as the first managers of the Coal Company was not illegal; assuming that as officers of the Railroad they could contract with themselves as officers of the Coal Company; assuming that at the time of organization it was not unlawful for the Railroad Company and the Coal Company, not only to have officers but offices in common, and finally assuming that all these facts together

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did not, in and of themselves, establish an identity of corporate interest, still these facts taken together are most significant. They at least prove that the relation between the parties was so friendly that they were not trading at arm's length. And the further fact that one of the parties was under a statutory disability as to hauling coal makes it necessary to carefully scrutinize their arrangement in order to determine whether it was a *bona fide* and lawful contract of sale, or a means by which the Railroad though parting with the legal title retained an interest and control in what had been sold.

4. That contract is published in full in 213 Fed. Rep. 255-259. The provisions material in the present inquiry may be thus summarized:

(a) The Railroad Company agreed to sell and the Coal Company agreed to buy all of the coal mined or acquired by the Railroad Company during the continuance of the contract; (b) the price for the more important commercial grades was to be 65 per cent. of the New York price on the day of delivery; (c) the amount of coal to be sold and

delivered was at the absolute option of the Railroad Company as its interests might determine; (d) the Coal Company was not to buy coal from any other person or corporation without the written consent of the Railroad Company; (e) the Coal Company was to conduct the selling of the coal so as best to conserve the interests, good-will and markets of the coal mined by the Railroad Company; (f) the Coal Company was to continue to fill the orders of present responsible customers of the Railroad Company, even if some of such sales might be unprofitable; (g) the Railroad leased to the Coal Company all its trestles, docks and shipping facilities at a rental of 5 per cent. of their value; (h) the contract could be terminated by either party on giving six months' notice.

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The most cursory examination of the contract shows that—while it provides for the sale of coal before transportation begins—it is coupled with onerous and unusual provisions which make it difficult to determine the exact legal character of the agreement. If it amounted to a Sales Agency the transportation was illegal because the Railroad Company could not haul coal which it was to sell in its own name or through an agent. If the contract was in restraint of trade it was void because in violation of the Sherman Anti-Trust Law. The validity of the contract cannot be determined by consideration of the single fact that it did provide for a sale. It must be considered as a whole and in the light of the fact that the sale at the mine, was but one link in the business of a Railroad engaged in buying, mining, selling and transporting coal.

5. By virtue of the fact that the Railroad Company bought, mined and sold, it—like any other dealer—was interested in maintaining prices, since the contract did not fix a definite sum to be paid for all of the coal sold, but provided that the Railroad Company was to receive 65 per

cent. of the New York price on the day the coal was loaded into the cars. The higher the rate in New York the better for the seller. And, by the contract, the Railroad reserved a power which, when exercised, could not only curtail production but shipments. Thus by decreasing the amount transported the supply in New York could be lessened. This would tend to raise New York prices and thus increase the sum the Railroad was to receive.

The Railroad Company was in the business of selling, and it is not to be presumed that its power to limit deliveries or to prevent the Coal Company from obtaining coal elsewhere would be often exercised. Yet the power did exist and it was reserved for some purpose—not, as argued, to prevent controversy as to failure to deliver in

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cases of strikes or accidents, for such is not the language or intent of the contract. Nor is room left for the implication [necessary to the validity of such an exclusive contract, *Chicago &c. R. R.* v. *Pullman*, 139 U. S. 80 (3), 89, 90], that the seller would deliver reasonable amounts at reasonable times. All such defensive arguments are excluded by the express and emphatic terms of the contract that "the amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire."

It might be said that if such a power was exercised the Coal Company could then go into the market and purchase from other coal dealers. But this contract deprives the buyer even of that ordinary business privilege, declaring that the Coal Company "will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation, except with the written consent of the seller."

6. Reading these two clauses together, it is evident that the Coal Company was neither an independent buyer nor a free agent. It was to handle nothing except the Railroad's coal and was the instrument through which the Railroad sold all its product. The Coal Company, though incorporated to do a general coal business, was dependent solely upon the Railroad for the amount it could procure and sell and was absolutely excluded from the right to purchase elsewhere without the consent of the Railroad Company, which, however, was under no corresponding obligation to supply any definite amount at any definite date.

Restrictive contracts should at least be reciprocal and mutual—for if A is bound to purchase only from B the latter should certainly be bound to furnish what A wishes to buy [*Chicago &c. R. R.* v *Pullman*, 139 U. S. 80 (3),

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89, 90]—especially is this true when the subject of the contract is an article in which the public is interested. Even at common law, in passing upon the validity of contracts in restraint of trade, the "public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires the contract may be sustained." *Gibbs* v. *Baltimore Consolidated Gas Co.*, 130 U. S. 396, 409; *Fowle* v. *Park*, 131 U. S. 97.

In this case the subject of the contract was anthracite coal—an article of public necessity and of limited supply, one-tenth being controlled by the appellee. The Railroad Company might have justly insisted on contract provisions intended to secure payment for all that it produced. But going beyond what was required for its own protection, it restrained the Coal Company from buying from anyone else, and,—what is probably more significant in this case—thereby prohibited the Coal Company from

competing with the Railroad Company for the purchase of coal mined on the Railroad lines. And, this was not a mere perfunctory provision, because the Railroad Company was a buyer of coal and purchased 1,500,000 tons per annum from mines on its system. By this contract it excluded from that market the Coal Company, which, with its capital of $6,000,000, could have been a strong competitor. Such a provision may not have actually effected a monopoly. But considering the financial strength of the carrier; its control of the means of transportation; its powers to fix the time when transportation of the very coal sold was to begin; its power in furnishing cars to favor those from whom it bought or to whom it sold—such a contract would undoubtedly have that tendency. In that respect it was opposed to that policy of the law, which was the underlying reason for the adoption of the Commodity Clause. *New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 373.

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7. There is another provision of the contract which shows that the Railroad had such an interest in the coal as enabled it to dictate to whom it should be sold, even at unprofitable prices. The agreement provides:

"Sixth. The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable, it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit."

This is not a mere stipulation that the Coal Company would not injure the reputation of the Railroad Com-

pany's coal; while the further provision that the Coal Company would 'continue to fill the orders of all responsible present customers, even though some of such sales might be unprofitable,' was a further indication of the fact that both parties recognized the Railroad had an interest in the coal and used the Coal Company to preserve and secure that interest even after transportation began.

The unusual, onerous and restrictive terms imposed by this contract may, as between the parties, have been negligible—certainly so as long as the stockholders remained the same, since a loss to the Coal Company would be presumably represented by a gain to the Railroad Company. But the Commodity Clause and the Anti-Trust Act are not concerned with the interest of the parties but with the interest of the public and it, therefore, makes no difference whether this contract dictated by the Railroad Company was for the permanent advantage of the Coal Company.

8. It is argued, however, that the contract has not operated to the injury of the parties or of the public.

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And, in answer to those urged by the Government, it is said that some of the objections now insisted on were not pressed in the lower court; that there is no complaint that the Railroad charged the Coal Company exorbitant prices; or, that it ever raised the New York prices; or, that it failed to make prompt deliveries; or, that it has prevented the Coal Company from buying coal from other operators; or, that the Railroad monopolized the coal mined on its railway, or that it deprived such mining companies of an open market. From this it is argued that the present objections to the contract are purely academic. But its validity depends upon its terms. And if, as a matter of law, the contract is in restraint of trade, or, if the Coal Company is practically the agent of the Rail-

road Company then the transportation of the coal by the latter is unlawful.

9. As already pointed out, the contract has in it elements of a sale and elements of a sales agency. It provides that the Railroad Company will sell and that the Coal Company will buy all coal that is mined during the continuance of the contract; but it prevents the Coal Company from buying from any one else. It requires it to sell to present railroad customers at the old price, even though those prices may be unprofitable. The seller is not bound to make deliveries of fixed quantities at fixed dates and by decreasing what it will sell and determining when it will ship it has a power in connection with its power as a carrier, which, if exerted, would tend to increase prices in New York. Besides all this, the contract prevents the Coal Company from competing with the Railroad Company in the purchase of coal along the railway line. Taking it as a whole and bearing in mind the policy of the Commodity Clause to dissociate the Railroad Company from the transportation of property in which it is interested and that the Sherman Anti-Trust Act prohibits contracts in restraint of trade,* there would seem to be no

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doubt that this agreement violated both statutes.

10. The Railroad Company, if it continues in the business of mining, must absolutely dissociate itself from the coal before the transportation begins. It cannot retain the title nor can it sell through an Agent. It cannot call that Agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet subject to the control of the Railroad Company. If the Railroad sells coal at the mouth of the mines to one buyer or to many it must not only part with all interest direct or indirect in the property but also with all control over it or over those to whom the coal is sold at the mines.

It must leave the buyer as free as any other buyer who pays for what he has bought. It should not sell to a corporation with officers and offices in common,—for the policy of the statute requires that instead of being managed by the same officers, they should studiously and in good faith avoid anything, either in contract or conduct, that remotely savors of joint action, joint interest or the dominance of one Company by the other. If the seller wishes—by a lawful and *bona fide* contract, whose provisions as to delivery and otherwise are not in restraint of trade—to sell all of its coal to one buying company, then that one buyer can be bound by reasonable terms and required to pay according to the contract. But such buyer should otherwise be absolutely free to extend its business to buy when, where and from whom it pleases, and otherwise to act as an independent dealer in active competition with the Railroad Company.

What has been said is sufficient to show that the contract was invalid. That makes it unnecessary to discuss other questions raised but not disposed of by the District Court, and the decision herein is without prejudice to the right of the United States to institute proceedings in

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reference thereto or to test the right of the Railroad Company to purchase coal for sale.

The decree is reversed with directions to enter a decree enjoining the Railroad from further transporting coal sold under the provisions of the contract of August 2, 1909, referred to in the Petition.

Reversed.

Mr. Justice McReynolds took no part in the decision of this case.

UNITED STATES v. READING COMPANY
253 U.S. 26, 40 Sup. Ct. Rep. 425, 64 L.ed. 760 (1920)

UNITED STATES OF AMERICA, Appt.,

v.

READING COMPANY, Philadelphia & READING RAILWAY COMPANY, et al., (No. 3)

READING COMPANY, Philadelphia & Reading Railway Company, et al., Appts.,

v.

UNITED STATES OF AMERICA (No. 4)

Monopoly — unlawful combination — lease of railroad — lessor's covenant as to shipments.

1. A covenant in a lease by a coal company of a railway owned by it to another railway company, which may be construed to require the coal company to ship to market over the leased line three fourths of all the coal it produces, cannot be said to impose an undue restriction upon the coal company in selecting its markets and in shipping its coal, in violation of the Sherman Anti-trust Act, where the lines of the two railway companies are in no sense competitive, the leased line serving as a natural extension of the lessee railway company's lines to the great tonnage-producing coal districts, and where the rental to be paid is one third of the gross earnings of the railway.

Injunction — against enforcement of monopolistic contract — covenant in lease of coal lands.

2. Attempts to enforce a covenant in leases for the operation of coal-producing lands that the lessee shall ship all coal mined by rail routes which are named, or

which are to be designated, are properly enjoined where such covenant was resorted to as part of a scheme in contravention of the Sherman Anti-trust Act to control the mining and transportation of coal.

Appeal — judgment — dismissal without prejudice.

3. Where a majority of the individual defendants in a suit to dissolve a combination found to contravene the Sherman Anti-trust Act have died since the suit was instituted, and their successors, in office have not been made parties, and the conclusion to be announced can be given full effect by an appropriate decree against the corporate defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

Monopoly — unlawful combinations — carriers and coal companies — dissolution.

4. An undue and unreasonable restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and a monopolization of such trade and commerce, forbidden by the Sherman Anti-trust Act, and calling for dissolution of the combination, results from a scheme whereby a holding company was created and placed by stock control in a position to dominate, not only two great competing interstate railway carriers, but also two great competing coal companies engaged extensively in mining and selling anthracite coal which must be transported to interstate markets over the controlled interstate railway lines, which power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully, until the Federal Supreme Court condemned certain percentage coal contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation, the holding company continuing, up

to the time the present dissolution suit was begun, in active dominating control of the carriers and coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings.

Carriers — association with community carried — stock ownership.

5. The combination in a single corporation of the ownership of all of the stock of a carrier and of all of the stock of a coal company violates the commodities clause of the Act of June 29, 1906, making it unlawful for any railway company to transport in interstate commerce any article mined or produced by it or under its authority, or which it may own, or in which it may have any interest, direct or indirect, where all three companies have the same officers and directors, and it is under their authority that the coal mines are worked and the railway operated, and they exercise that authority in the one case in precisely the same character as in the other; viz., as officials of the holding company, the manner in which the stock of the three is held resulting, as intended, in the abdication of all independent corporate action by both the railway company and the coal company, involving, as it does, the surrender to the holding company of the entire conduct of their affairs.

Carriers — association with commodity carried — stock ownership.

6. While the ownership by a railway company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful, under the commodities clause of the Act of June 29, 1906, for the railway company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for the purpose of partici-

pating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require.

Judgment — dissolution — monopoly — extent of relief.

7. A combination of competing interstate railway carriers and competing coal companies, found to violate both the Sherman Anti-trust Act and the commodities clause of the Act of June 29, 1906, must be so dissolved as to give each of such companies its entire independence, free from stock or other control.

[Nos. 3 and 4.]

Argued October 10 and 11, 1916. Restored to docket for reargument May 21, 1917. Reargued November 20 and 21, 1917. Restored to docket for reargument June 10, 1918. Reargued October 7, 1919. Decided April 26, 1920.

CROSS APPEALS from the District Court of the United States for the Eastern District of Pennsylvania to review a decree granting a part of the relief sought by the United States in a suit to dissolve a combination asserted to violate both the Sherman Anti-trust Act and the commodities clause of the Act of June 29, 1906. Affirmed in part and reversed in part, and remanded with directions to enter a decree of dissolution of the intercorporate relations existing between corporate defendants so as to give each company its entire independence.

See same case below, 226 Fed. 229.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

Mr. Justice **Clarke** delivered the opinion of the court:

These are appeals from a decree entered in a suit instituted by the government to dissolve the intercorporate relations existing between the corporation defendants, for the alleged reason that through such relations they con-

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stitute a combination in restraint of interstate commerce in anthracite coal, and an attempt to monopolize or a monopolization of such trade and commerce, in violation of the first and second sections of the Anti-trust Act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. §8820, 9 Fed Stat. Anno. 2d ed. p. 644); and also for the alleged reason that the defendants Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey are violating the commodities clause of the Act of Congress of June 29, 1906 (34 Stat. at L. 585, chap. 3591, Comp. Stat. §8563, 4 Fed. Stat. Anno. 2d ed. p. 359), by transporting over their lines of railroad, in interstate commerce, coal mined or purchased by coal companies with which they are associated by stock ownership.

It will contribute to brevity and clearness to designate the defendant corporations as follows: Reading Company, as the Holding Company; Philadelphia & Reading Railway Company, as Reading Railway Company; Philadelphia & Reading Coal & Iron Company, as Reading Coal Company; Central Railroad Company of New Jersey, as Central Railroad Company; Lehigh & Wilkes-Barre Coal Company as Wilkes-Barre Company; Lehigh Coal & Navigation Company as Navigation Company.

Practically all of the anthracite coal in this country is found in northeastern Pennsylvania, in three limited and substantially parallel deposits, located in valleys which are separated by mountainous country. For trade purposes

these coal areas are designated: the most northerly, as the Wyoming field, estimated to contain about 176 square miles of coal: the next southerly, as the Middle or Lehigh field, estimated to contain about 45 square miles; and the most southerly, as the Schuylkill field, estimated to contain about 263 square miles of coal.

The annual production of the mines in these three fields in 1896 was about 43,640,000 tons, and in 1913 it slightly exceeded 71,000,000 tons. The chief marketing centers for this great tonnage of coal are New York, distant by rail from the fields about 140 miles, and Philadelphia, distant

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about 90 miles. From these cities it is widely distributed by rail and water throughout New York and New England, and, to some extent, through the South.

Such a large tonnage was naturally attractive to railroad carriers, with the result that the Wyoming field has six outlets by rail to New York harbor, viz.: the Central Railroad of New Jersey and five others, known as initial anthracite carriers. The Lehigh field has three such rail outlets, but the largest, the Schuylkill field, has only two direct rail connections with Philadlephia and New York, viz.: the Reading and the Pennsylvania Railroads. Outlets by canal to Philadelphia and tidewater, at one time important, may here be neglected.

This description of the subject-matter and of its relation to the interstate transportation system of the country will suffice for the purposes of this opinion. It may be found in much greater detail in the cases cited in the margin.[1]

[1] United States v. Reading Co. 183 Fed. 427; United States v. Reading Co. 226 Fed. 229; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 878; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90.

The essential claims of the government in the case have become narrowed to these, viz.:

First: That the ownership by the Holding Company of controlling interests in the shares of the capital stock of the Reading *Railway* Company, of the Reading Coal Company, and of the Central Railroad Company, constitutes a combination in restraint of interstate trade and commerce, and an attempt to monopolize and a monopolization of a part of the same, in violation of the Anti-trust Act of July 2, 1890.

Second: That the Holding Company in itself constitutes a like violation of the act.

Third: That certain covenants and agreements between the Central Railroad Company and the Navigation Company,* contained in a lease, by the latter to the former, of

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the Lehigh & Susquehanna Railroad, constitute a like violation of the act.

Fourth: That the transportation in interstate commerce by the Reading Railway Company and by the Central Railroad Company, of coal mined or purchased by the coal companies affiliated with each of them, constitutes a violation of the commodities clause of the Act to Regulate Commerce.

Pursuant to the provisions of the Act of June 25, 1910 (36 Stat. at L. 854, chap. 428, Comp. Stat. § 8824, 6 Fed. Stat. Anno. 2d ed. p. 137), the case was heard by three circuit judges of the third circuit, who, while holding against the contention of the government on many of the prayers for relief in the bill; some generally and some without prejudice, also held that the Reading Coal Company and the Wilkes-Barre Coal Company were naturally competitive producers and sellers of anthracite coal, and that their union through the Holding Company and the Central

Company constituted a combination in restraint of trade within the Anti-trust Act, and for this reason the Central Company was ordered to dispose of all the stock, bonds, and other securities of the Wilkes-Barre Coal Company owned by it, and was enjoined from requiring the Coal Company to ship its coal over the lines of the Central Company.

The court also held that clauses in mining leases by the Reading Coal Company and by the Wilkes-Barre Coal Company, and their subsidiaries, requiring the lessees to ship all coal produced, over roads named or to be designated, were unlawful and void.

The case has been appealed by both parties, and is before us for review on all of the issues as we have thus stated them.

Reference to the history of the properties now controlled by the Holding Company will be of value for the assistance it will be in determining the intent and purpose with which

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the combinations here assailed were formed. Standard Oil Co. v. United States, 221 U. S. 1, 46, 76, 55 L. ed. 619, 639, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

The Philadelphia & Reading *Railroad* Company was chartered by special act of the Pennsylvania general assembly in 1833, and it conducted the business of a railroad carrier prosperously for about thirty years, when, as its annual reports show, it embarked upon the policy of attempting to control the anthracite tonnage of the Schuylkill field by acquiring extensive ownership of coal lands. Thus, the report of the company for 1870 contains the following:

> "Up to this time about 70,000 acres of the best anthracite coal lands in Pennsylvania have been acquired

and will be held by an auxiliary company known as the Philadelphia & Reading Coal & Iron Company, of which the Philadelphia & Reading Railroad Company *is the only stockholder.* The result of this action has been to secure—and *attach to the company's railroad* —a body of coal land capable of *supplying all the coal tonnage that can possibly be transported over the road for centuries.*"

And this is from the report for 1880:

"The transportation of coal has always been a source of great profit to the railroad company, and the only doubt in the past as to the permanency of the earning power of the company as a transporter was due to the *fear that rival companies would tap the Schuylkill region* and divert the coal tonnage to their own lines. *This danger was happily averted by the purchase of the coal lands.*"

And this from the report of 1881:

"The coal estates of the Philadelphia & Reading Company . . . consist of 91,149 acres (142 square miles) of coal lands, *which is 60 per cent of all the anthracite lands in the Schuylkill district, and 30 per cent of all in Pennsylvania.*"

This area of coal lands had increased by 1891 to 102,573 acres, of which the report said:

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"The coal lands comprise in extent about 33 per cent of the entire anthracite-coal fields of the state, and taking into account the aggregate thickness of the veins on the company's lands, and the greater proportionate depletion of the estates in the other regions, which has been going on for many years, it must be conceded that we have *at least* 50 *per cent of the entire deposit remaining unmined.*"

As if in further pursuit of this now settled purpose, in the following year, 1892, the Reading Railroad Company leased the Lehigh Valley Railroad and the Central Railroad of New Jersey for 999 years. These were both anthra-

cite carriers competing with the Reading, and each had an important coal mining subsidiary company. But the lease by the Central Railroad Company was assailed in the New Jersey courts, and all operations under it were enjoined, with the result that both leases were abandoned.

It is obvious that these reports show an avowed and consistently pursued purpose (not then prohibited by statute) to secure by purchase a dominating control over the coal of the Schuylkill field and over the transportation of it to market.

In the large financial operations incident to the expansion policy thus described, bonds were issued, secured by a mortgage on all of the property of the Reading Railroad Company and of the Reading Coal Company. In 1893 there was default in the payment of interest on these bonds, and receivers were appointed who operated both properties until 1896, when they were sold to representatives of the creditors and stockholders of the two companies, and under a scheme of reorganization, the validity of which is assailed in this suit, both properties were transferred to three corporations in the manner now to be described:

1st. To the Reading *Railway* Company, a corporation newly organized under the laws of Pennsylvania, were allotted about 1,000 miles of the railroad (but none of

the equipment) which had been owned or leased by the former Reading *Railroad* Company. The capital stock of this company was fixed at $20,000,000, and it issued $20,000,000 of bonds, all of which were given to the Holding Company. The property thus transferred was valued, in the representations made at the time to the New York Stock Exchange, at $90,000,000. In 1896 this railroad carried in excess of 9,000,000 tons of anthracite,— more than one fifth of the then total production of the country.

But by the plan of reorganization adopted it was disabled from performing its functions as a carrier, except with the aid of the Holding Company, for all of the equipment, engines, cars, and ships owned by the former railroad company, and its tidewater terminals at Philadelphia and on New York harbor, were allotted to the Holding Company.

2nd. By the decree of sale the Reading Coal & Iron Company was released from its former obligations and to it, thus freed, the principal part of the property (coal and other), owned by it before the sale, was allotted and retransferred upon condition that it would deliver all of its capital stock to the Holding Company, would become co-obligor with that company on bonds to be issued, and would join with it in executing a mortgage for $135,000,000 on all of its property to secure such bonds. This company thus came into possession of 102,573 acres of anthracite lands, owned and leased,— almost two thirds of the entire acreage of the Schuylkill coal field,—stocks and bonds in other coal companies, coal in storage, and other property, all of the estimated value of $95,000,000.

3d. To serve the purposes of the intended Holding Company, a charter granted in 1871 by special act of the general assembly of Pennsylvania, but unused for twenty years, was utilized. This charter was of the class denominated "omnibus" by the supreme court of Pennsylvania,

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and in terms it authorized the company to engage in, or control, almost any business other than that of a bank of issue,—this broad charter was the occasion for making use of the company in this enterprise. The corporate name was changed to "Reading Company," its capital stock was increased from $100,000 to $140,000,000, and the purchasers at the receivers' sale allotted and transferred to it railroad equipment, real estate, colliers and barges, formerly owned

by the Reading *Railroad* Company, together with stocks which gave it control of more than thirty short-line railroads, aggregating 275 miles of track, and other property of large value, in addition to all of the bonds and stock of the new Reading *Railway* Company, and all of the stock of the Reading Coal Company.

The result of this intercorporate transfer of the property, owned before the reorganization by the Reading *Railroad* Company and the Reading Coal & Iron Company, was that the Holding Company, without any outlay,—solely because the creditors and stockholders of the former Reading Railroad Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies,—became the owner of the title to railway equipment, real estate, colliers and barges of an estimated value of $34,400,000; plus all of the capital stock and bonds of the new Railway Company,— $40,000,000; plus all of the capital stock of the Coal Company,—$8,000,000,—and a contract by that company to mortgage, for the use of the Holding Company, its entire property; plus other stocks, bonds, and mortgages owned by the former Railroad Company of the estimated value of over $38,000,000,—making a total value, as represented at the time to the New York Stock Exchange, of $193,613,000.

Thus, this scheme of reorganization, adopted and executed six years after the enactment of the Anti-trust

Act, combined and delivered into the complete control of the board of directors of the Holding Company all of the property of much the largest single coal company operating in the Schuylkill anthracite field, and almost 1,000 miles of railway over which its coal must find its access to interstate markets. This board of directors, obviously,

thus acquired power: to increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act. United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53.

Obvously, also, it made the Coal Company and the Railway Company mere agents or instrumentalities of the Holding Company—the mining and transportation departments of its business—for producing, purchasing, and selling coal and for transporting it to market. The Reading *Railway* Company and the Reading Coal Company each had thereafter but one stockholder,—the Holding Company,—and their earnings were to be distributed not in proportion to the shares of their capital stocks, aggregating $28,000,000, but were to go to the creditors and shareholders of the Holding Company, with its mortgage debt of $135,000,000 and its capital stock of $140,000,000. The Holding Company thus served to pool the property, the activities, and the profits of the three companies. Northern Securities Co. v. United States, 193 U. S. 197, 327, 362, 48 L. ed. 679, 696, 710, 24 Sup. Ct. Rep. 436.

It will be profitable to consider next what use was made of the great power thus gathered into the one Holding Company.

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In 1898 this Holding Company entered into a combination with five other anthracite-carrying railroad companies to prevent the then contemplated construction of an additional line of railway from the Wyoming field to tidewater,

which independent miners and shippers of coal were promoting for the purpose of securing better rates on their coal to the seaboard. In a mere holding company, the Temple Iron Company, all six carriers combined, as stockholders, for the purpose of providing $5,000,000, with which the properties of the chief independent operators, Simpson and Watkins, were purchased, and thereby the new railroad project was defeated. The president of the Holding Company was active in the enterprise, and that company, although only one of six, became responsible for 30 per cent of the required financing. In United States v. Reading Co. 226 U. S. 324, 351, 57 L. ed. 243, 251, 33 Sup. Ct. Rep. 90, this court characterized what was done by this combination, under the leadership of the Holding Company, in these terms:

> "The New York, Wyoming, & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained."

And, again, at p. 355:

> "We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the states, in plain violation of the Act of Congress of July 2, 1890."

About the year 1900 the Holding Company and many other initial anthracite carriers and their controlled coal companies, pursuant to an agreement with each other, made separate agreements with nearly all of the independent producers of coal along their lines, to purchase at the mines "all the anthracite coal thereafter mined from any of their mines now opened or operated, or which might thereafter be opened and operated," and to pay therefor 65 per cent of the average price of coal prevailing at tide-

water points at or near New York, computed from month to month. In the case above cited, this court discussed these contracts and declared: that they were made for the purpose of eliminating the competition of independent operators from the markets, and thus removing "a menace to the monopoly of transportation to tidewater which the defendants collectively possessed;" that before these contracts, there existed not only the power to compete, but actual competition, between the coal of the independents and that produced by the buying defendants; but that, after the contracts were made, "such competition was impracticable;" that the case fell well within not only the Standard Oil Co. Case, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, and American Tobacco Co. Case, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; but was of such an unreasonable character as to be "within the authority of a long line of cases decided by this court;" and finally, that the defendants had combined, by and through the instrumentality of the 65 per cent contracts, with the purpose and design of unlawfully controlling the sale of the independent output of coal at tidewater.

Thus, this court held that once within two years, and again within four years after it was organized, this Holding Company used the great power which we have seen was centered in its board of directors, by adroit division of property and corporate agency, for the purpose of violating, in a flagrant manner, the Anti-trust Act of 1890.

Almost immediately after the two attempts to monopolize the trade in anthracite thus condemned by this court, the Holding Company, in January, 1901, purchased a controlling interest in the capital stock of the Central Railroad Company. When this suit was commenced, that company was operating 675 miles of track, over which it carried in 1913, 10,783,000 tons of anthracite,—almost one half

of its total freight traffic. Its capital stock was then $27,436,000, and its funded debt was $46,881,000.

This Central Company owned, at the time, in excess of

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eleven twelfths of the capital stock of the Wilkes-Barre Coal Company, with a capital stock of over $9,000,000, and a funded debt of about $17,000,000. And that company owned or had leased in excess of 14,000 acres of coal-bearing lands,—13,000 acres in the Wyoming field,—and in the year ending June 30, 1913, it shipped from its lands thus owned or controlled, 6,243,000 tons of coal, which was sold for over $20,000,000.

Immediately after this purchase, the president of the Holding Company, Mr. Baer, was made president of the Central Railroad Company and of the Wilkes-Barre Coal Company, and remained such until his death, after the commencement of this suit, and from one third to one half of the directors of each company were thereafter chosen from the board of the Holding Company. Thus from the time of this purchase both companies have been actively dominated by the Holding Company management.

It is argued that the Central Railroad, thus acquired, and the Reading system, were not competitors, but this question is put beyond discussion by the testimony of Mr. Baer, the president of the Reading Company, and his immediate predecessor in office, Mr. Harris. The former testified:

Q. You are president of the defendants, the Reading Company, Philadelphia & Reading Railway Company, Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and the Temple Iron Company?

A. I am. . . .

Q. What do you regard as the competitors of the Philadelphia & Reading now in New York harbor, as to anthracite coal?

A. All the companies that ship to New York. They would be the Pennsylvania Railroad, the Lehigh Valley, the Delaware & Lackawanna, the Delaware & Hudson,* the Erie,

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Ontario, & Western. I guess those are all the roads leading to New York directly or indirectly. (He did not name the Central Company because it was a part of the Reading system when he testified.)

Q. Those roads are all carrying anthracite coal to New York harbor?

A. Yes, sir.

Q. And you regard them as competitors who must be considered in fixing rates?

A. Yes, sir; unquestionably.

Mr. Harris testified:

Q. During the time that you were president of the Philadelphia & Reading Railroad Company, from 1893 to 1901, what were the competitive roads in the coal trade with which you came in competition?

A. We came in competition with all the roads that were carrying coal from Pennsylvania.

Q. Name the principal ones in reference to carrying coal from the coal mines to New York harbor.

A. The Reading, the Lehigh Valley, *the Central Railroad of New Jersey,* the Delaware, Lackawanna, & Western, the Erie, and the Pennsylvania Railroad.

That the Reading Coal Company and the Wilkes-Barre Coal Company were competitors before the latter passed under the control of the Holding Company is obvious, but Mr. Baer put this also beyond dispute by testifying:

Q. Prior to 1901, were the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Company competitors as sellers of coal in New York harbor?

A. Yes; and they are today.

Q. And generally throughout the eastern territory they were competitors at that time?

A. Yes, sir; through that northern territory. Not in this territory nor in the southern.

Thus, by this purchase, the Reading Holding Company

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acquired complete control, not only of one of the largest competitive anthracite carriers, but also of one of the largest competitive coal producing and selling companies in the country. The anthracite tonnage of the Central & Reading Railway Companies, thus combined, exceeded, at the time, 18,000,000 tons,—over one third of the then total production of the country,—and the revenue derived from it was more than one third of the total earnings of the two railroad companies.

In 1915 the Interstate Commerce Commission concluded an investigation of the "rates, practices, rules, and regulations governing the transportation of anthracite coal," which had been in progress for three years. The eleven initial anthracite carriers which have lines penetrating the coal-producing region were required to furnish special reports as to their anthracite coal transportation operations, and they appeared and participated in the hearing. The result of this exhaustive investigation was that the Commission found: that since about 1901, with variations and exceptions which are negligible here, the carriers have had the same fixed and flat rates to tidewater, regardless of the distance and character of the haul; that these rates were the result of co-operation or combination among the carriers; and that they were excessive to such an extent that material reductions by all of the carriers were ordered, including, of course, those of the Central and Reading companies. The Commission also found, and this appears in the record of this case, that the Reading Coal

Company had never paid any dividends on its stock, and that, while the books of the Holding Company showed the Coal Company to have been indebted to it in a sum exceeding $68,000,000 for advances of capital made by the Reading *Railroad* Company before the reorganization in 1896, it has paid interest thereon only occasionally and in such small amounts that up to 1913 it fell short by more than $30,000,000 of equaling 4 per cent per annum on the in-

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debtedness. In the meantime advances of large sums had been made by the Holding Company to the Coal Company, and unusual credits had been allowed the latter in the payment of its freight bills. This dealing of the Holding Company with the Reading Coal Company, and similar dealing of the Central Company with the Wilkes-Barre Coal Company and the Navigation Company, are denounced by the Commission as unlawful discrimination against other shippers of coal over the rails of these two companies, and, obviously, such favoritism tends to discourage competition and to unduly restrain interstate commerce.

Upon this history of the transactions involved, not controverted, save as to some findings of the Interstate Commerce Commission, we must proceed to judgment; and very certainly it makes a case calling for the application of repeated decisions of this court, which clearly rule it.

It will be convenient to first dispose of several minor contentions.

In 1871 the Navigation Company leased the Lehigh & Susquehanna Railroad, which it owned, to the Central Railroad Company, by an instrument containing a covenant which the government claims requires the Navigation Company to ship to market over the leased line three fourths of all the coal which it should produce in the future. This covenant has been amended and supplemented

by several agreements, but not so as to essentially modify it with respect to the contention we are to consider.

It is argued that this covenant necessarily imposed an undue restriction upon the Navigation Company in selecting its markets and in shipping its coal, in violation of the Anti-trust Act.

It is not entirely clear that the covenant will bear the restrictive interpretation as to shipments which the gov-

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ernment puts upon it, but, assuming that it may be so interpreted, nevertheless, the conditions and circumstances of the case considered, the result contended for cannot be allowed.

When the lease was made, in 1871, the Central Railroad extended from Jersey City to its western terminus at Phillipsburg, New Jersey, and it was without access to the coal fields. The Lehigh & Susquehanna Railroad was about 100 miles in length, and extended from Phillipsburg into the Wyoming field, where the Navigation Company owned extensive coal-producing properties and mines. The lines of the two companies were in no sense competitive, but, on the contrary, the Lehigh & Susquehanna line served as a natural extension of the Central Company's line's to the great tonnage-producing coal districts. The rental to be paid was one third of the gross earnings of the railroad, and it was natural and "normal" that the lessor should desire that the traffic should continue to be as large as possible. Plainly this covenant was not written with the purpose of suppressing interstate commerce, and the history of its operation shows that, instead of suppressing it, it has greatly promoted it. The claim is quite too insubstantial to be entertained, and the decree of the district court with respect to it will be affirmed and the bill, as to it, dismissed.

In many leases for the operation of coal-producing lands the Reading Coal Company and the Wilkes-Barre Coal Company incorporated a covenant that the lessee should ship all coal mined by rail routes, which were named or which were to be designated. Since this covenant was resorted to as a part of the scheme to control the mining and transportation of coal, which is condemned as unlawful in this opinion, the decree of the district court, enjoining the lessors and the other defendants herein from attempting to enforce such covenants, will be affirmed.

The other charges against the Lehigh Coal & Navigation

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Company and the case stated in the bill with respect to the Wilmington & Northern Railroad Company, the Lehigh & Hudson River Railway Company, and the Lehigh & New England Railroad Company, are substantially abandoned in the government's brief, and, having regard to the results arrived at with respect to the principal defendants, the ends of justice will be best served by dismissing the bill as to all of these defendants, without prejudice, as was done by the district court as to all but the Wilmington & Northern Railroad Company, as to which the dismissal was unqualified. A majority of the individual defendants have died since the suit was instituted, and their successors in office have not been made parties, and, since the conclusion to be announced can be given full effect by an appropriate decree against the corporation defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

We are thus brought to the consideration of what the decree shall be with respect to the really important defendants in the case, the three Reading companies, the Central Railroad Company of New Jersey, and the Wilkes-Barre Coal Company.

Before the reorganization of 1896, the gathering of more than two thirds of the acreage of the Schuylkill field into the control of the two Reading Companies was, as their reports show, for the frankly avowed purpose, then not forbidden by statute, of monopolizing the production, transportation, and sale of the anthracite coal of the largest of the three sources of supply.

When, in 1896, the problem was presented of reorganizing the financial affairs of the two companies, it was not solved, as it might have been, by creating separate coal and railroad companies to conduct independently interstate commerce in the two departments to which their railroad and coal properties were adapted, but, on the contrary, and

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very obviously for the purpose of evading the provision of the Constitution of Pennsylvania prohibiting any incorporated common carrier from, directly or indirectly, engaging in mining "articles" for transportation over its lines (Pa. Const. 1874, art. 17, § 5), and also of evading the provisions of the Federal Anti-trust Act against restraining and monopolizing interstate commerce, resort was had to the holding company device, by which one company was given unrestricted control over the other two, with the power, inherent in that form of organization, of continuing and carrying forward the restraint and monopoly which had previously been acquired over that large volume of interstate commerce which was to be conducted by the coal and railroad companies.

Again, when, in 1901, a rivalry, imaginary or real, arose for the control of the Central Railroad Company, the Holding Company, regardless of the law, did not hesitate to purchase control of that great competing anthracite coal-carrying system, with its extensive coal-owning and mining subsidiary. This acquisition placed the Holding Com-

pany in a position of dominating control not only over two great competing interstate railroad carriers, but also over two great competing coal companies, engaged extensively in mining and selling anthracite coal, which must be transported to interstate markets over the controlled interstate lines of railway.

Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce, within the meaning of the Anti-trust Act, has been frequently held by this court.

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Thus, in Northern Securities Co. v. United States, 193 U. S. 197, 327, 48 L. ed. 679, 696, 24 Sup. Ct. Rep. 436, when dealing with a holding company, such as we have here, this court, in 1903, held:

"No scheme or device could more certainly come within the words of the act—'combination in the form of a trust or otherwise . . . in restraint of commerce among the several states or with foreign nations,'—or could more effectively and certainly suppress free competition between the constituent companies . . . *The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect*, and which the public is entitled to have protected."

And again, in United States v. Union P. R. Co. 226 U. S. 61, 88, 57 L. ed. 124, 134, 33 Sup. Ct. Rep. 53, decided nine years later, in 1912, this court held:

"The consolidation of two great competing systems of railroad engaged in interstate commerce by transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates . . . Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. *It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.*"

It will suffice to add that this doctrine was referred to as the settled conclusion of this court, in 1914, when, discussing a similar state Anti-trust Act in International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859, it was said:

> "The specification under this head is that the supreme court [of Missouri] found, it is contended, benefit—not injury to the public had resulted from the al-
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> leged combination. Granting that this is not an overstatement of the opinion, the answer is immediate. *It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and had some good effect* . . . The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

Thus, this record clearly shows a group of men selecting the Holding Company with an "omnibus" charter, and not only investing it by stock control with such complete dominion over two great competing interstate carriers and over two great competing coal companies extensively engaged in interstate commerce in anthracite coal as to bring it, without more, within the condemnation of the Anti-

trust Act, but it also shows that this power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully until this court condemned the 65 per cent contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation. To this it must be added that up to the time when this suit was commenced, this Holding Company had continued in active, dominating control of the Reading Railway Company and of the competing Central Railroad system, and also of the two coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings. It is difficult to imagine a clearer case, and in all essential particulars it rests on undisputed conduct and upon perfectly established law. It is ruled by many decisions of this court, but specifically and clearly by United States v Union P. R. Co. supra.

For flagrant violation of the first and second sections of the Anti-trust Act, the relations between the Reading Com-

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pany, the Reading Railway Company, and the Reading Coal Company, and between these companies and the Central Railroad Company of New Jersey, must be so dissolved as to give each of them a position in all respects independent and free from stock or other control of either of the other corporations.

With respect to the contention that the commodities clause of the Act of June 29, 1906 (34 Stat. at L. 584, 585, chap. 3591, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. pp. 337, 359), is being violated by the Reading Railway Company and the Central Railroad Company.

The circuit judges, centering their attention upon the fact that the Reading Railway Company did not own any of the stock of the Reading Coal Company; that the two companies had separate forces of operatives and separate

accounting systems; and upon the importance of maintaining "the theory of separate corporate entity" as a legal doctrine, concluded, upon the authority of United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 413, 53 L. ed. 836, 851, 29 Sup. Ct. Rep. 527, that the evidence did not justify holding that, in transporting the products of the Reading Coal Company's mines to market, the Reading Railway Company was carrying a commodity "mined or produced by it or under its authority," or which it owned "in whole or in part," or in which it had "any interest, direct or indirect."

But the question which we have presented by this branch of the case is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.

The purpose of the commodity clause was to put an end

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to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper. Plainly, in such a case as we have here, this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury,—any discriminating practice which would harm the general shipper would pro-

fit the Holding Company. Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute.

In terms the act declares that it shall be unlawful for any railroad company to transport in interstate commerce "any article or commodity . . . mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same "authority" that transported it over the railroad. All three of the Reading companies had the same officers and directors, and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other,—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action, by both the Railway Company and the Coal Company, involving, as it did, the surrender to the Holding Company of the entire conduct of their affairs.

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It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same "authority" that operated the Reading Railway lines. The case falls clearly within the scope of the act, and for the violation of this commodity clause, as well as for its violation of the Anti-trust Act, the combination between the Reading Railway Company and the Reading Coal Company must be dissolved.

The relation between the Central Railroad Company and the Wilkes-Barre Coal Company presents a different question, for here the Railroad Company owns over eleven twelfths of the stock of the Coal Company, and therefore the holding in 213 U. S. 366, supra, is especially pressed in argument,—that the ownership of stock by a railroad company in a coal company does not cause the former to have such an interest in a legal or equitable sense in the product of the latter as to bring it within the prohibition of the act. But this holding was considered in United States v. Lehigh Valley R. Co. 220 U. S. 257, 272, 55 L. ed. 458, 463, 31 Sup. Ct. Rep. 387, and it was there held not applicable where a railroad company used its stock ownership for the purpose of securing a complete control over the affairs of a coal company, and of treating it as a mere agency or department of the owning company. This rule was repeated and applied in United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 529, 59 L. ed. 1438, 1443, 35 Sup. Ct. Rep. 873. It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two, such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for the purpose of partici-

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pating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require. United States v. Lehigh Valley R. Co. 220 U. S. 257, 272,

273, 55 L. ed. 458, 463, 464, 31 Sup. Ct. Rep. 387; United States v. Delaware, L. & W. R. Co. supra; Chicago, M. & St. P. R. Co. v. Minneapolis Civic & C. Asso. 247 U. S. 490, 501, 62 L. ed. 1229, 1237, 38 Sup. Ct. Rep. 553.

Applying this rule of law to the relation between the Central Railroad Company and the Wilkes-Barre Coal Company, with the former owning over eleven twelfths of the capital stock of the latter, and using it as the coal mining department of its organization, we cannot doubt that it falls within the condemnation of the commodities clause, and that this relation must also, for this reason, be dissolved.

It results that the decree of the District Court will be affirmed, as to the Lehigh Coal & Navigation Company, the Lehigh & New England Railroad Company, the Lehigh & Hudson River Railway Company, as to the restrictive covenants in the mining leases with respect to the shipping of coal, as to the dissolution of the combination between the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Coal Company, maintained through the Reading Company and the Central Railroad Company of New Jersey. As to the Wilmington & Northern Railroad Company and as to the individual defendants, the bill will be dismissed without prejudice. As to the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, and the

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Central Railroad Company of New Jersey, the decree of the District Court will be reversed and the cause remanded with directions to enter a decree in conformity with this opinion, dissolving the combination of the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, existing and maintained

through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other, of the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, and also that such disposition shall be made by the decree of the stocks and bonds of the Lehigh & Wilkes-Barre Coal Company, held by the Central Railroad Company of New Jersey, as may be necessary to establish entire independence between these two companies, to the end that the affairs of all of these now combined companies may be conducted in harmony with the law.

Affirmed in part; reversed in part, and remanded, with direction to enter a decree in conformity with this opinion.

Mr. Chief Justice **White**, Mr. Justice **Holmes**, and Mr. Justice **Van Devanter**, dissenting:

Except in so far as the decree below commanded a separation of interest between the Central Railroad of New Jersey and the Lehigh & Wilkes-Barre Coal Company, the court below dismissed, for want of equity, the bill of the United States, brought to sever the existing relations be-

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tween the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and other corporations, on the ground that the relations between those companies resulted in a monopoly or combination in restraint of trade, in violation of the Sherman Act, and gave rise to a disregard of the commodities clause of the act of Congress.

By the opinion now announced, this action of the court below, in so far as it directed a dismissal, is reversed, and virtually the full relief prayed by the government is therefore granted. We are unable to concur in this conclusion, because, in our opinion, neither the contentions as to the Sherman Act, nor the reliance upon the commodities clause, except to the extent that in the particulars stated they were sustained by the court below, have any foundation to rest upon. We do not state at any length the reasons which lead us to this view, because the court below, composed of three circuit judges, in a comprehensive and clear opinion announced by McPherson, Judge, sustains the correctness of the action which it took, and also demonstrates the error involved in the decree of this court, reversing its action. United States v. Reading Co. 226 Fed. 229. To that opinion we therefore refer as stating the reasons for our dissent.

UNITED STATES v. LEHIGH VALLEY R. CO., 254 U.S. 255, 41 Sup. Ct. Rep. 104, 65 L.ed. 253 (1920)

UNITED STATES OF AMERICA, Appt.,
v.
LEHIGH VALLEY RAILROAD COMPANY, Lehigh Valley Coal Company, et al.

Monopoly — unlawful combination — carrier and coal company.

1. A railway company which, in combination with a subsidiary coal company controlled by it through stock ownership and common officers, deliberately enters upon a policy of making extensive purchases of anthracite land tributary to the railway company's lines, for the purpose of controlling the mining, transportation, and sale of coal to be obtained therefrom, and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and continues this policy after the passage of the Anti-trust Act of July 2, 1890, with increasing energy and tenacity of purpose, with the result that a practical monopoly is attained of the transportation and sale of anthracite coal derived from such lands, violates the provisions of §§ 1 and 2 of such act, forbidding restraints of interstate trade or commerce, and monopolization of or attempts to monopolize a part of such trade or commerce.

Carriers — association with commodity carried — sale to carrier's agent — monopolistic contract.

2. A contract which an anthracite coal company, controlled by an interstate railway carrier through stock ownership and common officers, made with a sales com-

any, the stockholders in which were practically identical with those in the railway company, whereby the coal company is to sell the coal mined by it to the sales company, the latter to pay therefor at 65 per cent of the New York prices, and to sell no other coal than that purchased from the coal company, there being further provisions that the coal company shall lease all its facilities, structures, and trestles to the sales company; that either party shall have the right to abrogate and cancel the contract upon giving six months' notice, and that the sales company shall not buy coal except from the coal company,—violates both the commodities clause of the Act of June 29, 1906, making it unlawful for any railway company to transport in interstate commerce any article which it may own or in which it may have any interest, and the Sherman Anti-trust Act of July 2, 1890, prohibiting contracts in restraint of trade.

Judgment — dissolution — monopoly — relief — injunction.

3. A combination effected through intercorporate relations between an interstate railway carrier, an anthracite coal company, and a sales company, which is found to violate both the Sherman Anti-trust Act of July 2, 1890, and the commodities clause of the Act of June 29, 1906, must be so dissolved as to give each of such companies its entire independence, and all contract relations between the coal company and the sales company which would serve in any manner to prevent the sales company from extending its business of buying and selling where and from and to whom it chooses with entire freedom and independence must be enjoined, so that the sales company may in effect, as well as in form, become an independent dealer, free to act in competition with the coal company or railway company.

[No. 1.]

Argued October 12 and 13, 1916. Restored to docket for reargument May, 21, 1917. Reargued November 7, 1917. Restored to docket for reargument June 10, 1918. Submitted October 7, 1919. Restored to docket for oral argument May 17, 1920. Reargued October 5, 1920. Decided December 6, 1920.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree which dismissed the bill in a suit by the United States to dissolve intercorporate relations between corporations alleged to violate the Sherman Anti-trust Act and the commodities clause of the Hepburn Act. Reversed and remanded for the entry of a decree in conformity with the opinion.

See same case below, 225 Fed. 399.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

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Mr. Justice **Clarke** delivered the opinion of the court:

This is an appeal from a decree entered in a suit to dissolve the intercorporate relations existing at the time it was commenced in March, 1914, between the defendant corporations, other than Girard Trust Company, for the reason, it is averred, that they were so united that they constituted a combination in restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and an actual monopolization of a part of such commerce, in violation of the Anti-trust Act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644); and also for the alleged reason that the Lehigh Valley Railroad Company was transporting over its lines of railway anthracite coal in which it had an interest, in violation of the commodities

clause of the Act of June 29, 1906 (34 Stat. at L. 585, chap. 3591, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 359).

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It will be necessary to consider only the relations and activities of the Lehigh Valley Railroad Company, hereinafter designated the Railroad Company, the Lehigh Valley Coal Company, designated the Coal Company, and the Lehigh Valley Coal Sales Company, designated the Sales Company.

A condensed history, chiefly admitted, of the organization, stock ownership, and conduct of these three companies, and the application to the fact thus developed of fully established principles of law, will be decisive of the case.

The limited area of anthracite-producing territory, its relation to the interstate transportation system and markets of our country, and the various attempts to monopolize and control the great railway tonnage originating therein, have all been so often described in reported cases, that they need not be repeated here in detail.[1]

It will suffice for our present purpose to say that the anthracite-producing territory is very restricted in area, it all being within seven counties of eastern Pennsylvania, with the known deposits underlying only 309,760 acres of land. For trade purposes it is divided into three fields; the northerly is called the Wyoming field, the next southerly the Lehigh or Middle field, and the southerly the Schuylkill field. The lines of the Railroad Comany extend

[1] United States v. Reading Co. 183 Fed. 427; United States v. Reading Co. 226 Fed. 229; United States v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; United States v. Reading Co. 253 U. S. 26, 64 L. ed. 760, 40 Sup. Ct. Rep. 425.

into the Wyoming and Lehigh fields, but to only one colliery in the Schuylkill field. Much the greater part of its tonnage is derived from the Wyoming field, and four fifths of it moves in interstate commerce.

The Railroad Company in 1913 owned 1,438 miles of main line and a total trackage of 3,354 miles, its capital

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stock was $60,600,000, its funded debt was $85,800,000, its total assets had a book value of $182,700,000, but a much greater actual value, and it carried a larger tonnage of anthracite coal than any other railroad in the country,—over 13,000,000 tons in 1913, this being 18.84 per cent of the total 69,000,000 tons shipped over all railroads in that year.

In 1864 the Railroad Company, by merger with a coal company, acquired a small acreage of anthracite-containing land, and thereupon added the mining, shipping, and selling of coal to its duties as a carrier.

The annual reports of the Railroad Company show that, as early as 1868, it entered upon the policy of acquiring by purchase and lease the control of as much as possible of the anthracite-coal-containing lands tributary to its lines of railroad, for the purpose of preventing, or, when it had become established, of suppressing, competition in the carrying of coal over its interstate lines to interstate markets.

Thus the annual report of the Company for 1868 shows that, it having been determined that it was of "the utmost importance" to the future welfare of the company to secure "control of tonnage from regions having other outlets to markets," the Company, by merger of two coal companies, obtained coal lands which secured to it the whole trade of the Hazelton coal field, and "the withdrawal from

competition" of a business so large as to greatly strengthen the "future prospects of the road."

In 1869 the policy of securing a proportion of the coal trade from each region by the purchase of interests in companies owning lands on or near the several branches of the Company was approved and continued.

In 1871 it is reported: "We have continued to acquire interests in coal lands situated in our various regions."

In 1872, after detailing the purchase for $2,000,000 of 5,800 acres of land having upon it ten collieries, the report of the Company declares that, "should there be a corresponding increase for a year or two more, the total

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consumption will so nearly equal the full capacity of the mines for production as to *render unnecessary all attempts to regulate or control the trade.*"

After reciting that a contract had been entered into granting to the Delaware, Susquehanna, & Schuylkill Railroad Company trackage rights to tidewater, the report of the Railroad Company for 1894 continues, saying that there is thereby assured to the Company "an important traffic . . . for which several outlets existed, and which had been in contention for some time previous. It also removes an incentive to the construction of further new lines into the territory tributary to the Lehigh Valley system."

Although in 1875 it caused the Coal Company (hereinafter discussed) to be organized for the purpose of taking title to coal lands then owned or which might thereafter be purchased, and although the Anti-trust Law was enacted in 1890, nevertheless, the Railroad Company continued its policy of purchasing for control, and from time to time it acquired and took in its own name the title to

extensive tracts of coal lands and to stocks in coal companies. Thus, in 1885 it acquired the entire capital stock of the Wyoming Valley Coal Company, the owner of 1,657 acres of anthracite land; in 1900 it acquired the entire capital stock of the Westwood Coal Company, a considerable owner of anthracite land; in 1901 it acquired the entire capital stock of the Connell Coal Company; and in the same year the entire capital stock of the Seneca Coal Company, the owner of 1,308 acres of anthracite land.

In the years prior to 1905 the Railroad Company made a number of other purchases of coal land, but in that year it made its largest single and most significant purchase, when it acquired, for the sum of $17,440,000, all of the capital stock of Coxe Brothers & Company, Inc. This company was the largest independent coal operator then

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on the line of the Railroad Company, and its production for 1905 exceeded 1,100,000 tons. It not only owned extensive areas of coal land, on which were located eight collieries, but it was also owner of all of the capital stock of the Delaware, Susquehanna, & Schuylkill Railroad Company, which owned 50 miles of railway which served other large independent mines in addition to those of Coxe Brothers & Company, Inc. This railroad had connections with the Reading, Pennsylvania, and New Jersey Central lines, which were taken up or fell into disuse when the control of it passed to the defendant Lehigh Valley Railroad Company. The Railroad Company continued to own all the capital stock of Coxe Brothers & Company, Inc., to the time the testimony was taken in this suit, and it is admitted that that company then held in fee or under long lease 36,490 acres of land in the anthracite field, 7,169 acres of which were known to contain anthracite coal. This purchase was confessedly made to prevent the diversion of traffic to other lines, and, while the company was

continued in form as a separate corporation, the officers and directors of the Coal Company were made its officers and directors, and in June following the year of the purchase its directors by resolution provided that the net earnings of the company should be paid to the Railroad Company without the formality of declaring a dividend, and this practice continued until 1911.

Thus, this important coal company and its railroad became a mere coal-producing and transporting agency of the defendant Railroad Company.

In 1874 the state of Pennsylvania adopted a constitution containing the provision that

"No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works." (Pa. Const. 1874, art. 17, § 5.)

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Prior to this time the Railroad Company had been a large owner, miner, shipper, and seller, as well as carrier of anthracite coal, and, as if for the purpose of complying with the new constitution of the state from which it derived its franchise, it caused the Lehigh Valley Coal Company to be created in 1875 by the consolidation of two smaller companies. This company, which was organized for the purpose of taking title to coal lands and stocks in coal companies, then owned or thereafter to be acquired by the Railroad Company, and to conduct the business of mining, shipping, and selling coal, had an original capital of $650,000, which was afterwards increased to $1,965,000, all of which has been owned by the Railroad Company from the beginning. Coal-producing lands and stocks in various coal companies were purchased from time to time by the Railroad Company, directly or through advances of money to the new coal company for that purpose, title thereto

being taken in the Coal Company; with the result: that when this suit was commenced that Company admitted itself to be the owner of 54,229 acres of land in the anthracite-producing regions, of which 24,748 acres were located along the lines of the Railroad Company; that the funded debt of the company had become $20,000,000; and that the value of its assets amounted to about $35,000,000. Eight and one-half million tons of anthracite, of the thirteen millions carried by the Railroad Company in 1913, were produced by this Coal Company and by Coxe Brothers & Company, Inc., owned, as we have seen, by the Railroad Company. The combined acreage of lands owned by the Coal Company and by Coxe Brothers & Company, Inc., is admitted to be 90,719 acres, of which 61,238 acres are located along the lines of the Railroad Company. The annual reports of the Coal Company show that in 1903 56.77 per cent of the coal transported over the railroad was produced by the Coal Company and its affiliated companies; that in 1906 the percentage produced and purchased was 85.25

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per cent of that transported; and in 1907 it was 87.11 per cent. The Interstate Commerce Commission found that in 1908 the company controlled 95 per cent of the tonnage moving over its line to tidewater. Meeker v. Lehigh Valley R. Co. 21 Inters. Com. Rep. 129, 154.

The Railroad Company and the Coal Company had usually the same president, secretary, treasurer, and auditor, and the latter company admits, as it must, that the Railroad Company, "as the owner of stock, controls and long since has been controlling, the election of its directors." The Railroad Company constantly advanced large sums of money to the Coal Company for the purchase of property and for operating capital. The total of these advances to the year 1892 exceeded $15,500,000 which amount, however, was reduced by operations of the Coal Company to $11,500,000. The Coal Company never paid any dividends,

its earnings being frankly treated as those of the Railroad Company, and the financial and other relations between the two companies were so intimate and interlaced that in argument it is admitted that, "in the last analysis, the assets of the Coal Company are the assets of the Railroad Company."

There is much more in the record to like effect, but sufficient has been stated to make it clear beyond controversy that the Coal Company was organized and conducted as a mere agency or instrumentality of the Railroad Company, for the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands and in the conducting of coal mining, shipping, and selling operations by the Railroad Company, and that the policy of purchasing and leasing coal lands tributary to its lines for the purpose of controlling interstate trade and commerce in anthracite coal, and of preventing and suppressing competition therein, was deliberately entered upon by the Railroad Company, and, in combination with its agency, the Coal Company, was consistently pursued, with increasing

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energy and scope after the passage of the Anti-trust Act, until the commencement of this suit, unless these purposes and results, in point of law, were modified and cured by the organization in 1912 of the Sales Company, and by the functions which it performed,—which remain to be considered.

On January 11, 1912, the board of directors of the Railroad Company requested the directors of the Coal Company "to consider the propriety of organizing a Sales Company" and of entering into a contract with it when formed "for a limited time" for the purchase and sale by it "of the coal mined, purchased, and owned by the Coal Company." The board also requested that the privilege of subscribing for the stock of the new company be extended,

"not to the Railroad Company, but, prorata, to the common and preferred stockholders of the Railroad Company." As if anticipating compliance with its request on the part of the Coal Company, of which it owned all of the stock, the officers of the Railroad Company were authorized at the same meeting of the board to take such action and make such conveyances as might be deemed necessary or advantageous in perfecting the sales arrangement with the new company to be organized; and, in aid of the enterprise, a dividend of 10 per cent on the stock of the Railroad Company was declared, payable on February 26, which amounted in the aggregate to $6,060,800.

On the same day the board of directors of the Coal Company resolved: that the new Sales Company should be organized, as requested by the Railroad Company, with a capital stock of $10,000,000, but that only $6,060,800 of it should be issued; that when the new company was formed the Coal Company should, "if possible," contract with it for a "limited time" for the sale to it "of all coal which shall be mined, purchased, owned, or acquired" by the Coal Company during the term of the proposed contract, so that the title to such coal should vest in the Sales Company

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"before the transportation thereof shall be commenced."

The privilege of subscription to the capital stock of the new company was restricted to the stockholders of the Railroad Company.

The Sales Company was promptly organized, and the minutes of the company show that slightly less then 97 per cent of the stock was subscribed for by stockholders of the Railroad Company.

The Sales Company had seven directors. One of these, J. W. Skeele, who was also elected president, had been general sales agent of the Coal Company; another, W. R.

Evans, had been assistant to the general sales agent of the Coal Company; another, L. D. Smith, was a director of the Railroad Company, and a fourth, Paul Moore, was a son of a large stockholder in the Railroad Company. The vice president of the Company, G. N. Wilson, had been general auditor of the Railroad Company, and the treasurer, W. J. Burton, had been employed as assistant secretary of the Coal Company.

It is too plain for discussion that, with a company thus organized and officered, the making of a contract by the Coal Company for the sale of all of its coal to the Sales Company was, in substance and effect, making a contract with itself, the terms of which it could determine in its discretion.

Immediately after the organization of the Sales Company, the anticipated contract between that company and the Coal Company for the purchase of all the coal which the latter might mine or purchase was entered into and bears date March 1, 1912. This contract was to continue for ten years unless terminated in the manner which it provides for, and its terms are so nearly identical with the earlier Lackawanna contract, which is considered in United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873, that the judge who tried this case below, with entire propriety, says that the differences be-

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tween the two are "wholly unsubstantial" (225 Fed. 401). This court held that the contract in the Lackawanna Case was void because violative of the provisions of the Anti-trust Act and the commodities clause of the Act to Regulate Commerce.

The discussion of the Lackawanna contract is so full and satisfactory in 238 U. S. 516, that it would not serve any useful purpose to comment in detail upon the contract which we have here. It will suffice to say that the pro-

visions of the Lackawanna contract, which were clearly determinative of the former decision by this court, are plainly the same in substance, and almost exactly the same in form, as those in the contract we are considering, viz.: The agreement of the Coal Company (1) to sell and of the Sales Company to buy all of the coal mined by the Coal Company from lands owned or leased by it, together with all coal which it might purchase; (2) that the prices to be paid for the more important grades of coal shall be 65 per cent of the New York prices,—the two contracts are in precisely the same words in this respect; (3) that, with negligible exceptions, the Sales Company is to sell no other coal, for itself or for any other, than that "purchased" from the Coal Company; (4) that the Coal Company shall lease all of its facilities, structures, and trestles to the Sales Company; (5) that either party shall have the right to abrogate and cancel the contract upon giving to the other six months' notice of its desire so to do; (6) that the Sales Company shall not buy coal except from the Coal Company—a provision which excludes the Sales Company, potentially a strong competitor, from the market. The Coal Company purchased 2,960,000 tons of coal in 1911, in addition to that which it mined.

These are the contract provisions which led this court, in the former case, to hold that a corporation organized and circumstanced as is the Sales Company which we have

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here—subject to be stripped at the will of another of all of its business and of all its facilities for carrying on the business for which it was incorporated—was neither an "independent buyer nor a free agent."

Being entirely satisfied with the reasoning upon which the Lackawanna Case proceeds to its conclusion, we hold now, as it was there in principle held: that the purchase in form by the Sales Company did not so dissociate the Rail-

road Company from the transportation of coal in which it was interested as to meet the requirements of the law; that the contract, nominally of purchase, was so calculated to restrain interstate trade as to be obnoxious to the Anti-trust Act of Congress, and that for this reason it is unlawful and void.

It will be of service in determining the purposes of the defendant Railroad Company with its corporate subsidiaries in the activities thus discussed, to recall the history of the defendant Railroad Company, as it appears in the decisions of this and of other courts.

In 1892 the defendant Railroad Company and the Central Railroad Company of New Jersey leased their lines of railway for the term of 999 years to the Reading Railroad Company, a parallel competing carrier, extensively engaged in mining, marketing, and selling anthracite coal. This combination, had it become operative, would have gone far toward monopolizing the interstate transportation and trade in anthracite coal of our entire country; but all operations under the lease of the Central Railroad Company of New Jersey were enjoined by the New Jersey courts, for the reason that it was deemed to be in restraint of trade, against public policy, and calculated to partially destroy competition in the production and sale of anthracite coal,—a staple commodity of the state. Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964. Thereupon the lease of defendant's property was abandoned and surrendered.

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Six years later, in 1898, the defendant Railroad Company combined with the Reading and four other railway companies to contribute a large sum of money, which was successfully used to prevent the construction of a projected, competing line of railroad from the anthracite fields to tidewater. Of this enterprise this court said: "We are

in entire accord with the view of the court below in holding . . . that the transaction involved a concerted scheme to combine for the purpose of restraining commerce among the states, in plain violation of the Act of Congress of July 2, 1890. United States v. Reading Co. 226 U. S. 324, 355, 57 L. ed. 243, 253, 33 Sup. Ct. Rep. 90."

Four years later, in 1902, the defendant Railroad Company united with the Reading and four other anthracite carriers in a combination to control the entire tonnage of coal produced by independent operators along the lines of their respective railways. The device this time resorted to was a contract to purchase all the coal produced by independent mines, then opened or which might thereafter be opened by the vendors, and to pay therefor 65 per cent of the market price prevailing at tidewater points at New York, to be computed from month to month by an arbitrator to be selected by agreement. These contracts were elaborately considered and unsparingly condemned by this court in the case which is cited, and the conclusion reached was that the defendants in that case had unlawfully combined, by and through the instrumentality of the 65 per cent contract, for the purpose of controlling the sale at tidewater of the independent output of anthracite coal. The contracts were declared to be unlawful and were ordered canceled. 226 U. S. 370, 371, 373.

In 1911, in Meeker & Co. v. Lehigh Valley R. Co. 21 Inters. Com. Rep. 129, 154, 163, the Interstate Commerce Commission held that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company was one of bookkeeping; that the Railroad Company "had monopolized the coal field served

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by it," and that it had been guilty of unjust discrimination and of charging unreasonable rates, for which reparation was awarded. 23 Inters. Com. Rep. 480. This decision was

sustained by this court in Meeker & Co. v. Lehigh Valley R. Co. 236 U. S. 412, 59 L. ed. 644, P.U.R. 1915D, 1072, 35 Sup. Ct. Rep. 328. Ann. Cas. 1916B, 691.

And yet again, in 1915, the Interstate Commerce Commission, after an investigation extending over three years, in which the defendant Railroad Company and all other initial carriers of anthracite were parties, held that the rates charged by the defendant and other carriers to tidewater and to certain interior points were unreasonable; that by trackage and other arrangements they had extended advantages to their subsidiary coal companies, to the prejudice of other shippers; and that concessions as obnoxious as "direct cash rebates" had been made to such coal companies. Re Rates for Transportation of Anthracite Coal, 35 Inters. Com. Rep. 220.

This history of almost twenty-five years casts an illuminating light upon the intent and purpose with which the combination here assailed was formed and continued. Standard Oil Co. v. United States, 221 U. S. 1, 76, 55 L. ed. 619, 65[illegible] 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

Without further comment, this discussion of the record requires us to conclude that it is clearly established that, prior to the enactment of the Anti-trust Act, the Railroad Company, in combination with its Coal Company subsidiary, deliberately entered upon a policy of making extensive purchases of anthracite land tributary to the Railroad Company's lines, for the purpose of controlling the mining, transportation, and sale of coal to be obtained therefrom, and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and that this policy was continued after the passage of the Anti-trust Act with increasing energy and tenacity of purpose, with the result that a prac-

tical monopoly was attained of the transportation and sale of anthracite coal derived from such lands.

The area of the anthracite territory is so restricted that to thus obtain control of the supply of such coal on a great system of railway (the amount transported exceeded one fifth of the entire production of the country for the year before this suit was commenced) by a combination of corporations, such as we have here, and by such methods as we have seen were employed, effected a restraint of trade or commerce among the several states, and constituted an attempt to monopolize and an actual monopolization of a part of such trade or commerce in anthracite coal, clearly within the meaning of the first and second sections of the Anti-trust Act as they have frequently been interpreted by this court. Standard Oil Co. v. United States, 221 U. S. 1, 61, 55 L. ed. 619, 645 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 392, 393, 50 L. ed. 515, 521, 532, 26 Sup. Ct. Rep. 272; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 12766, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 533, 59 L. ed. 1438, 1445, 35 Sup. Ct. Rep. 873; United States v. Reading Co. 253 U. S. 26, 64 L. ed. 760, 40 Sup. Ct. Rep. 425.

Since we have also found that the contract between the Coal Company and the Sales Company was a mere device to evade the commodities clause of the Interstate Commerce Act, and therefore void, it results that the decree of the District Court must be reversed and the case remanded, with instructions to enter a decree, in conformity with this opinion, dissolving the combination effected through the intercorporate relations subsisting between the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company, Coxe Brothers & Company, Inc., the Delaware, Sus-

quehanna, & Schuylkill Railroad Company, and the Lehigh Valley Sales Company, with such provisions for the disposition of all shares of stock, bonds, or other evidences of indebtedness, and of all property of any character, of any

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one of said companies owned or in any manner controlled by any other of them, as may be necessary to establish their entire independence of and from each other. The contract of March 1, 1912, between the Coal Company and the Sales Company, must be decreed to be void, and all contract relations between the two companies enjoined which would serve in any manner to render the Sales Company not entirely free to extend its business of buying and selling coal where and from and to whom it chooses, with entire freedom and independence, so that it may in effect, as well as in form, become an independent dealer in coal, and free to act in competition, if it desires, with the defendant Coal Company or Railroad Company.

As to the New York & Middle Coal Field Railroad & Coal Company, the G. B. Markle Company, the Girard Trust Company, and the individual defendants, the bill must be dismissed.

Reversed and remanded with instructions to enter a decree in conformity with this opinion.

The **Chief Justice** and Mr. Justice **Holmes**, while, if they exercised an independent judgment, would be for affirmance, nevertheless concur in the conclusion now announced by the court because they consider that they are so constrained to do in virtue of the controlling effect of the previous decisions in the Lackawanna and Reading Cases cited in the opinion of the court.

Mr. Justice **McReynolds** and Mr. Justice **Brandeis** did not take part in the consideration and decision of this case.

UNITED STATES v. ELGIN, JOLIET & EASTERN RY. CO.

298 U.S. 492, 56 Sup. Ct. Rep. 841, 80 L.ed. 1300 (1936)

UNITED STATES *v.* ELGIN, JOLIET & EASTERN RAILWAY CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 660. Argued April 8, 9, 1936.—Decided May 25, 1936.

1. Legislative approval of a construction placed by this Court upon an Act of Congress is evidenced by failure to amend. P. 500.

2. The mere fact that all the shares of a railroad corporation and all the shares of a manufacturing corporation are owned by a holding company does not make transportation by the one of the products of the other unlawful under the commodities clause of the Interstate Commerce Act. P. 499.

United States v. *Reading Co.*, 253 U. S. 26, distinguished. Existence of power in the holding company to control the railway company, not exercised in the present case, did not make the railway company the *alter ego* of the holding company.

11 F. Supp. 435, affirmed.

APPEAL from a decree of the District Court of three judges, which dismissed a bill brought by the United States to enjoin the Railway Company from hauling the products of certain manufacturing companies in alleged violation of the commodities clause of the Interstate Commerce Act.

[Appearances and summaries of arguments omitted.]

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellee, incorporated under the laws of Illinois and Indiana, has been an interstate common carrier by railroad since 1884. It operates the "Chicago Outer Belt Line," 195 miles long, which runs from a point on Lake Michigan, north of Chicago, around that city to South Chicago, Gary and Porter, south and east. This line connects and interchanges freight with every railroad entering Chicago and serves many industrial plants. Among them are certain large producers of steel and steel products, operated by corporations, sometimes called "Subsidiaries," all of whose shares belong to the United States Steel Corporation: Illinois Steel Company, American Bridge Company, American Sheet and Tin Plate Company, National Tube Company, American Steel and Wire Company, and Cyclone Fence Company. Transportation of products—raw, semi-finished and finished—to and from and amongst the plants of the six constitutes 60 per cent of appellee's business. It files tariffs and complies generally with the Interstate Commerce Act and Commission regulations. During the years 1926-1930, its annual operating revenue exceeded $20,000,000.

The United States Steel Corporation, a holding—non-operating—corporation organized in 1901, then acquired and has ever since held, all shares of appellee, also all those of the producing companies.

By an Original Bill filed 1930 (amended 1932), the United States instituted this proceeding against appellee, sole defendant, in the District Court, Northern District of

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Illinois. They alleged that by transporting articles manufactured, mined, produced, or owned by subsidiaries of the United States Steel Corporation, appellee violated the Commodities Clause of the Interstate Commerce Act, Act

June 29, 1906, c. 3591, 34 Stat. 584, 585; U. S. C., Title 49, § 1 (8), copied in the margin,[1] and asked for an injunction prohibiting such action.

After answer, voluminous evidence and trial, the court below made findings of fact and announced an opinion. It concluded—

Mere ownership by the United States Steel Corporation of all shares of both appellee and a producing subsidiary was not enough to show that products made or owned by the latter were articles or commodities produced by the former, or under its authority, or which it owned in whole or in part, or in which it had an interest, direct or indirect, and was forbidden to transport by the Commodities Clause.

Also, "no single piece of evidence taken alone, nor all taken together and considered as a whole warrant the inference that the defendant and the producing and manufacturing subsidiaries are under the domination, control, direction, and management of the Steel Corporation, in the sense that the defendant and the other subsidiaries are mere departments, branches, adjuncts, and instrumentalities of the Steel Corporation. The evidence fails to show that the defendant has any interest, direct or indirect,"

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legal or equitable, in the articles or commodities which it transports for the subsidiaries of the Steel Corporation."

A final decree dismissed the Bill for want of equity and the cause is here by direct appeal (U.S.C., Title 49, § 45).

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[1] From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Both conclusions are challenged and we are asked to reverse the decree and grant relief as originally prayed.

The Commodities Clause became part of the Interstate Commerce Act in 1906, U. S. C., Title 49, § 1 (8), and has remained without material change. It was first interpreted here in *United States* v. *Delaware & Hudson Co.*, (1909) 213 U. S. 366, 415, where, by Mr. Justice White, the Court said:

> "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

This construction has been accepted and followed in the later cases. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 266; *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 526; *United States* v. *Reading Co.*, 253 U. S. 26, 62; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, 266.

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Through Mr. Justice Lamar, the court said, in *United States* v. *Delaware, L. & W. R. Co.*—

> "But mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used

as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. The amendment, however, was voted down; and, in the light of that indication of congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414. For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company."

Notwithstanding the intent imputed to Congress by this opinion, announced in 1915, no amendment has been made to the Commodities Clause. We must, therefore, conclude that the interpretation of the Act then accepted has legislative approval.

It is now insisted that, although a railroad company may own the shares of a producing company and yet transport the latter's products without violating the Commodities Clause, if a holding company acquires the shares of both carrier and producer, then such transportation becomes illegal. The theory is that the subsidiaries of holding companies are necessarily no more than parts of it. Evidently, this is entirely out of harmony with the reasoning advanced to support the construction of the Act adopted in

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United States v. *Delaware & Hudson Co., supra;* also in direct conflict with the above quoted language from *United States* v. *Delaware, L. & W. R. Co.*

Considering former rulings, it is impossible for us now to declare as matter of law that every company all of whose shares are owned by a holding company necessarily becomes an agent, instrumentality, or department of the latter. Whether such intimate relation exists is a question of fact to be determined upon evidence. . .

Counsel for appellants submit that the record compels the inference of fact that appellee and the subsidiary producing companies are but departments of the United States Steel Corporation; and that, as in *United States* v. *Reading Co., supra*, we should find the carrier is violating the Commodities Clause. It is not claimed that this inference derives from any single fact, but out of the mass. The following portion of the opinion in *United States* v. *Reading Company* is heavily relied upon—

> "But the question which we have presented by this branch of the case [alleged violation of the Commodities Clause] is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act."

And, having regard to this, they say—"The affirmative answer given in the *Reading* case is controlling here."

Obviously what was there stated cannot be taken as declaration of an abstract principle; it had application

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to the relevant circumstances. Later (pp. 61-62) in the same opinion the essential ones are revealed—

"All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same 'authority' that operated the Reading Railway lines."

If the evidence here showed the relationship between the holding company, the carrier, and the producing companies to be substantially as in the *Reading* case, that opinion well might be regarded as controlling. But there is material difference and we must look elsewhere for guidance.

Properly to appraise the situation now presented particular attention must be given to the following facts. All shares of appellee and the subsidiary producing companies have been owned by the United States Steel Corporation since 1901. The railroad has been under constant supervision by the Interstate Commerce Commission. In The Matter of Alleged Rebates to the United States Steel Corporation, 36 I. C. C. 557, (1915). It functions as a separate corporate carrier under immediate control

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of its own directors, no one of whom is on the board of the holding company; it owns all necessary equipment, makes its own contracts, manages its own finances, serves its patrons without discrimination and apparently to their satisfaction. The lawfulness of the relationship between

the holding company and subsidiaries was challenged in *United States* v. *United States Steel Corp.*, decided here in 1920, 251 U. S. 417. After long and through investigation and consideration, this court held the Anti-trust Act was not being violated. The present proceeding is one to prevent probable future unlawful conduct and not to punish acts long since completed, however reprehensible. "Our consideration should be of not what the Corporation had power to do or did, but what it has now power to do and is doing." *United States* v. *United States Steel Corp., supra,* p. 444.

The court below made definite findings of fact and upon them reached the conclusions stated above. Although criticized, and notwithstanding certain isolated acts may indicate undue control over the carrier at their dates, we think that the findings are essentially correct and support the decree. Instances of participation in the affairs of the appellee by the officers of the United States Steel Corporation, stressed by counsel, are relatively few; a material part of them occurred years ago—some of the more important in 1909. They are not adequate to support the claim that appellee must be regarded as the *alter ego* of its sole stockholder. The mere power to control, the possibility of initiating unlawful conditions, is not enough, as clearly pointed out in *United States* v. *Delaware & Hudson Co., supra.* That a stockholder should show concern about the company's affairs, ask for reports, sometimes consult with its officers, give advice and even

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object to proposed action is but the natural outcome of a relationship not inhibited by the Commodities Clause.

We find no adequate reason for disapproving the challenged decree and it must be

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed.

The language of the commodities clause, read in the light of its legislative history, can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier, which experience had shown are likely to occur when a single business interest occupies the inconsistent position of carrier and shipper. See *United States* v. *Reading Co.*, 253 U. S. 26, 60, 61. Before the enactment of the commodities clause, Congress, by sweeping prohibitions, had made unlawful every form of rebate to shippers and every form of discrimination in carrier rates, service and facilities, injurious to shippers or the public. By the Sherman Act it had forbidden combinations in restraint of interstate commerce. But it did not stop there. The commodities clause was aimed, not at the practices of railroads already penalized, but at the suppression of the power and the favorable opportunity, inseparable from actual control of both shipper and carrier by the same interest, to engage in practices already forbidden and others inimical to the performance of carrier duties to the public. See *Delaware, L. & W. R. Co.* v. *United States*, 231 U. S. 363, 370; *United States v. Reading Co., supra*

It is not denied that the "indirect" interest of the carrier in the commodity transported, at which the statute strikes, may be effected through the instrumentality of a

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holding company which owns the stock, both of the carrier and the company which manufactures and ships the commodity. This was definitely established by the decision in *United States* v. *Reading Co., supra*, where it was held that the power of control through holding

company ownership of all the capital stock both of an interstate rail carrier and a shipper producing the commodity carried, plus an active exercise of that control, are enough to make the transportation unlawful.

While it was recognized, as had been held in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, that mere ownership, by a carrier or a shipper, of the stock of the other, does not call the statute into operation, the Court was careful to point out, pp. 62, 63, that "where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent or instrumentality or department of another company, the courts will look through the forms to the reality of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require." Domination in fact by a holding company both of the rail carrier and the producing shipper of commodities, in addition to its legal power to dominate them, is enough to bring the carrier within the prohibition of the commodities clause.

The only question for our decision is whether the complete power of the United States Steel Corporation, through stock ownership, to dominate both appellee and certain shippers over its lines, has been exercised sufficiently to exemplify the evil which the commodities clause was intended to prevent, and so to bring appellee within its condemnation. It is of no consequence that complaints of rebates by appellee to United States Steel Corporation

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subsidiaries have not been sustained, 36 I. C. C. 557, or that the Steel Corporation and its subsidiaries have been held not to infringe the Sherman Anti-Trust Act. *United*

States v. *United States Steel Corp.*, 251 U.S. 417. The commodities clause does not forbid rebating or attempts to monopolize interstate commerce, which are dealt with by other statutes. It is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest, through the exercise of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult.

It is not important, as the court below thought, that in the relations between the Steel Corporation and its subsidiaries "there was a scrupulous recognition of the separate entities," or that all transactions between them were "in the form of transactions and communications between two separate and distinct corporations," or that the business and accounts of each subsidiary "were kept separate and distinct" from those of others. Nor is it of any moment, as this Court seems to imply, that the affiliates do not have the same officers and directors, and that some years ago they abandoned the practice of maintaining interlocking directorates.

Those familiar with present day methods of corporate control will not be so naive as to suppose that the complete domination in fact of its subsidiaries by a holding company owning all their stock is in any way inconsistent with scrupulous recognition of their separate corporate entities, or with the maintenance of separate accounts and distinct personnels of officers and directors. Every holding company presupposes a relationship between it and a distinct corporate entity and its power to control the

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latter. Where the issue is whether that power has been exercised, "courts will look through the forms to the realities of the relation between the companies as if the

corporate agencies did not exist." Hence we are presently concerned with what is in fact done in the Steel Corporation's exercise of its power to control, not with the particular legal forms or methods under cover of which control may in fact be effected. And since we must look to its acts of control, in addition to its power acquired by stock ownership, as the decisive test, we must scrutinize what has occurred in the past as the best indication of the manner and extent of the use which may be made of the power in the future.

In appraising the Steel Corporation's acts of control over the appellee, it is of significance that the dominant interest in the inter-company relationship, unlike that in the earlier cases brought before the Court, is that of production, and not transportation. Appellee, although a common carrier, subject to public duties and responsibilities, is, in its relation to the Steel Corporation and its subsidiaries, but an appanage to their vast steel producing business. While the commodities clause makes no distinction between the one type of domination and the other, such control of a railroad is far more menacing to the public and to rival producers than is domination of producer interests by a carrier. When the carrier interest predominates, extension of its transportation facilities beyond the demands of its producing affiliates, and even to their competitors, with resulting benefit to the public, may well ensue. But where the producing interest is dominant, and the carrier is chiefly engaged in transporting the commodities of producing affiliates, restricted or indifferent service to competing producers and to the public, tardy or inadequate extension of facilities, discrimination in furnishing service and facilities, are dangers especially to be anticipated.

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In such a relationship, control of carrier capital accumulation, expansion and expenditure, is a peculiarly con-

venient and effective means of subordinating carrier public service to the interests of production, by restriction of carrier expansion which would benefit the public and competing producers, or by allowing it only under discriminatory conditions. It is with these general considerations in mind, especially pertinent to the present case, that its facts should be examined.

Since its formation in 1901 the Steel Corporation has owned all the capital stock of the appellee railroad and of the Illinois Steel Company, a manufacturing company which appellee serves. Through lease, in 1909, of the Chicago, Lake Shore and Eastern Railway line, and the acquisition of appurtenant trackage rights over another line, appellee secured and maintains direct transportation facilities between the Illinois Steel Company and mines and quarries, all subsidiaries of the Steel Corporation. Sixty per cent. of appellee's tonnage is furnished by Steel Corporation subsidiaries.

Although the Steel Corporation is exclusively a holding and not an operating company, its by-laws defining the president's duties provide that he "shall have general charge of the business of the corporation relating to manufacturing, mining and transportation." The record shows that this authority is exercised by close and constant supervision over the business and affairs of Steel Corporation subsidiaries; not through the formal proceedings of stockholders and directors meetings, but through conferences and correspondence taking place directly between the officers of the Steel Corporation and those of its subsidiaries.

From 1901 to 1920 there were on appellee's board of directors never less than four officers or directors of the Steel Corporation, selected from its most important officers. Since 1920 the appellee's board of directors has

been selected by appellee's president and elected by him acting as proxy for the Steel Corporation. He has likewise selected the officers, who have been elected by the Board at his suggestion. The record is replete with evidence, chiefly correspondence, showing the complete subservience of appellee's president to the officers of the Steel Corporation in matters of corporate policy. The subservience of appellee's board of directors to its president, and through him in turn to the Steel Corporation, is exemplified by appellee's settled practice from 1910 until the time of suit of entering into contracts without any previous approval by its board of directors. At its annual meeting of directors the contracts which have been previously entered into, and often have already been performed, are ratified and confirmed. This procedure was followed with respect to all contracts, some 2,313 in number, executed on behalf of appellee between 1910 and 1933.

Appellee's fiscal policy has for many years been dominated and rigidly controlled by the Steel Corporation. Dividends have been habitually declared and the amount of them fixed only after securing, by correspondence, the consent and approval of the officers of the Steel Corporation. The Steel Corporation draws to itself the surplus funds of its subsidiaries, including appellee, which are deposited with it, for its own use, often upon its specific request or demand, and at a rate of interest which it fixes. These funds are withdrawn by draft of the subsidiary, payable only upon acceptance by the Steel Corporation, and customarily upon notice given in advance. From 1920 to 1933 appellee's aggregate deposits with the Steel Corporation were $79,000,000, of which $32,000,000 were made at the request or demand of the Steel Corporation.

Since its formation the Steel Corporation has maintained under its direction and control a clearance account, by which monthly settlement is made of inter-company

accounts among its various subsidiaries. All of appellee's settlements of such accounts, except freight charges and traffic claims, are cleared through this account. The account is managed by the controller of the Steel Corporation. Interest is charged or allowed on balances due in the account at a rate of interest fixed by the treasurer of the Steel Corporation. Terms of settlement are controlled by it and not by free bargaining of debtor and creditor.

By direction of the finance committee of the Steel Corporation, its subsidiaries, including appellee, are required to obtain in advance the approval of the committee of all expenditures for capital account and improvements in excess of a specified amount. From 1920 to 1932 the limit was $10,000, since which it has been $5,000. Since 1908 the officers of the Steel Corporation have issued from time to time, to all its subsidiaries, instructions outlining in detail the rules and procedure governing their application to the Steel Corporation for its approval of their expenditures for improvements. This requirement was not perfunctory. Failure to secure from the officers of the Steel Corporation, in advance, the approval of capital expenditures, brought from them by letter or telegram swift reminder of the neglect. Requests for approval of proposed expenditures have been the occasion for careful inquiry by the officers of the Steel Corporation as to their necessity and propriety. In recent years approximately 70 per cent. of appellee's total capital expenditures have been of the class requiring consent by the Steel Corporation.* Included

* Out of an annual average capital expenditure by appellate of approximately $900,000, during each of the years from 1926 to 1930 inclusive, an average of over $600,000 annually required the prior approval of the Steel Corporation. In 1930, appellee made capital expenditures of $1,910,755, of which $1,315,773 required the approval of the Steel Corporation. Appellee's total capital expenditures from 1926 to 1930 amounted to $4,597,925, of which $3,153,817 required such approval.

were items directly affecting appellee's transportation

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service, such as the cost of rolling stock, procuring an adequate water supply for its engines, improvement of its right-of-way, and additional yard facilities.

With such minute and continuous control of capital outlays of appellee by an organization primarily interested in production rather than common carrier service, it is not surprising that the only expansion of appellee during the period of control has been its lease of the line of the Chicago, Lake Shore and Eastern Railway, a subsidiary of a Steel Corporation producing affiliate, the Illinois Steel Company, which it served almost exclusively, and the acquisition through this lease of a trackage privilege over the Chicago & Eastern Illinois Railroad, restricted to the hauling of products of producing subsidiaries of the Steel Corporation—an arrangement by which appellee raised its tonnage from subsidiaries of the Steel Corporation from 25 per cent to 60 per cent.

It was the chairman of the board of the Steel Corporation, not the officers of appellee, who had the deciding voice in determining whether the lease should be taken and who assumed active control of the negotiations for its acquisition. Again, in 1920, when the trackage agreement was subject to cancellation by reason of the receivership of the Chicago & Eastern Illinois, it was the chairman of the board of the Steel Corporation who actively controlled the successful negotiation for a continuance of the agreement.

The record discloses many other forms of actual control of the business and affairs of appellee by the Steel Corporation which it is unnecessary to detail. It is enough that those mentioned, when examined in their setting, show with convincing force that the appellee railroad is in fact obedient to the dominating control of producers

of commodities which it transports. In every instance when the Steel Corporation has conceived that it had any

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interest to subserve, appellee has willingly done its bidding. In none has there been any indication of a disposition to pursue any policy not at least tacitly approved by the Steel Corporation. The active and continuous control over appellee's finances and expenditures is alone sufficient to create a continuing danger of neglect and abuse of appellee's carrier duties in favor of the dominating production and shipping interest, a temptation and an opportunity which it was the purpose of the commodities clause to forestall. In addition, the Steel Corporation has exerted that power, in the acquisition of the Lake Shore lease and its appurtenant trackage rights, to secure special advantages for its producing subsidiaries. The trackage rights extend only to hauling their own product, not that of their rivals.

This relationship passes far beyond that which is normal between a railroad and its stockholders and establishes a control over appellee's policy as complete as though it were but a department of the Steel Corporation. If the commodities clause permits control such as is exhibited here, one is at a loss to say what scope remains for the operation of the statute. Whatever views may be entertained of the soundness and wisdom of the decision in *United States* v. *Delaware & Hudson Co., supra*, it neither requires nor excuses our reduction of the commodities clause to a cipher in the calculations of those who control the railroads of the country.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO concur in this opinion.

THE END

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1947.

The United States of America, Appellant, v. South Buffalo Railway Company, Bethlehem Steel Company, and Bethlehem Steel Corporation.	Appeal from the District Court of the United States for the Western District of New York.

[April 26, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

The Government, by direct appeal from the District Court,[1] invites us to reconsider and overrule the interpretation of the commodities clause of the Interstate Commerce Act [2] promulgated in *United States* v. *Elgin, Joliet and Eastern R. Co.*, 298 U. S. 492. That holding, in substance, is that the prohibition [3] against a railroad company transporting any commodity which it owns or in which it has an interest, except for its own use, does not prevent it from transporting commodities of a corpora-

[1] 49 U. S. C. § 45; 28 U. S. C. § 345.

[2] 49 U. S. C. § 1 (8).

[3] The complete text of the commodities clause provides: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

tion whose stock is wholly owned by a holding company which also owns all of the stock of the railway, unless the control of the railway is so exercised as to make it the *alter ego* of the holding company.

The present challenge to that doctrine is predicated on the following facts: Bethlehem Steel Corporation (the holding company) owns substantially all of the stocks of South Buffalo Railway Company (South Buffalo) and of Bethlehem Steel Corporation (the Steel Company). At its Lackawanna plant, near Buffalo, N. Y., the Steel Company produces steel and from it fabricates various products. These commodities are transported by the South Buffalo from the plant to the rails of trunk-line carriers. In fact, South Buffalo provides the sole terminal connection between this industry and the trunk-line railroads. It operates about 6 miles of main-line track and 81 miles of spur track, 58 miles of its trackage being on leased right-of-way within the steel plant where it connects with other trackage owned by the Steel Company itself.

While about 70% of South Buffalo revenues have been derived from the Steel Company traffic, it also renders terminal switching for 27 unrelated industries, some of considerable size. It enables all of them to ship, by direct connection, over five trunk-line systems and through interchange over seven more.

South Buffalo performs no transportation service and owns no facilities outside of the State of New York, where it operates only within the Buffalo switching district. It is classified by the Interstate Commerce Commission as an "S–1" carrier, which is defined as one engaged in "performing switching services only." It files tariffs covering switching service, both with the Interstate Commerce Commission and with the New York Public Service Commission. It does not appear to participate

with any line-haul railroad in a through interstate route or to receive a division of any joint or through rate.

In 1936 this Court decided *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492, and held that the production and transportation set-up of the United States Steel Corporation, one of Bethlehem's competitors, did not violate the commodities clause. Thereupon, Bethlehem made a study of the relations between itself, South Buffalo and the Steel Company in the light of this decision. It revised its intercorporate relationship in the next few years to comply, as it was advised, with the conditions under which this Court had found the statute inapplicable to United States Steel. It does not seem necessary to recite the complex details of intercorporate dealings before the reorganization about 1940 as this action for injunction was not begun until 1943 and the crucial question is whether there was a contemporaneous violation or a threat of violation against which the writ of the Court should be directed. Voluntarily abandoned courses of conduct are not grounds for injunction, though they may sometimes be relevant evidence of intent or similar issues.

At all times crucial to the Government's case, Bethlehem controlled the stock of both the shipper and the carrier corporations. It unquestionably had power to favor its shipping subsidiary at the expense of its carrying subsidiary, or vice versa. The first question is whether we will now hold that mere possession of the power, regardless of whether it is exercised or remains dormant, makes out a violation of the statute. This Court said in the *Elgin Case* that it does not.

It is the Government's contention that the *Elgin* decision misconstrued the Act, misunderstood its legislative history and misapplied the Court's own prior decisions. It is not necessary in the view we take of the case to

decide to what extent, if any, these contentions are correct. It is enough to say that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved. But we do not write on a clean slate. What the Court has written before is but one of a series of events, which convinces us that its overruling or modification should be left to Congress. As the Court held on our last decision day, when the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made. *Massachusetts* v. *United States*, 333 U. S. —, decided April 19, 1948. Moreover, in this case unlike the cited one, Congress has considered the alleged mistake and decided not to change it.

The Interstate Commerce Commission, after repeatedly calling the attention of Congress to the *Elgin Case* during its pendency, in 1936 reported its defeat in the litigation. Referring to commodities clause cases it said, "We recommend that Congress, in the light of facts already made available in our reports and in reports of investigations conducted by congressional committees, shall determine the appropriate limit of our jurisdiction in such cases and whether further legislation to extend that jurisdiction is necessary."[4] Congress took no action.

But its inaction has not been from inadvertence or failure to appreciate the effect of the Court's interpretation. A Bill was introduced in the Senate containing language relating to affiliates and subsidiaries calculated in effect to set aside the *Elgin* decision.[5] Section 12 of the Act as introduced read as follows:

"It shall be unlawful for any carrier by railroad *and, on and after January 1, 1941, it shall be unlawful*

[4] 50 Annual Report I. C. C. 30 (1936).

[5] S. 2009, 76th Cong., 1st Sess., March 30 (legislative day March 28) 1939.

for any carrier, other than a carrier by air, to transport, in commerce subject to this Act, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by or under the authority of such carrier *or any subsidiary, affiliate, or controlling person of such carrier,* or any such article or commodity in which such carrier, *subsidiary, affiliate, or controlling person* has any interest, direct or indirect, *legal or equitable,* except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier."

The italicized portions indicate the proposed additions which would have extended the clause to cover (1) carriers other than railroads, and (2) subsidiaries, affiliates and controlling persons.

At the beginning of hearings thereon by the Senate Committee on Interstate Commerce its chairman said that, with respect to the commodities clause, the purpose of the Bill was "To make effective the intent of Congress in prohibiting railroads, or other carriers after January 1, 1941, from transporting products not utilized in the conduct of their transportation business but in which they have an interest, direct or indirect." [6] A week later, in the course of the hearings when evidence began to be offered showing the effect the proposed clause might have on various industries, the chairman made this statement:

"Let me say this to you with reference to the commodities clause, so that there will not be a lot of time wasted on it. I am speaking for myself and not for the committee. I think the commodities clause will have to be changed; and if we are going to make such drastic changes in the commodity clause

[6] Hearings before Senate Committee on Interstate Commerce on S. 2009, 76th Cong., 1st Sess., 3 (April 3, 1939).

> as this bill would suggest, I think it ought not to be incorporated in this particular piece of legislation, but should come up as a separate piece of legislation so that we can devote considerable time and thought to that particular subject. This would so change the economic structure of a lot of industries that I think it is something that would have to have particular consideration in a separate piece of legislation."[7]

In a further discussion the Chairman added: "I might say, also, that if the commodities clause should stay in as it is at the present time it would disrupt a great many industries, and I would seriously question whether or not I wanted to attempt anything of that kind at this time, particularly in this specific piece of legislation."[8]

When the bill was reported to the Senate, the proposed change had been eliminated and the original language of the Act retained. The Committee, in reporting the bill, said, "The rewritten commodities clause was considered far too drastic and the subcommittee early decided against any change therein."[9]

The Government argues that the characterization of the rejected revised commodities clause as "too drastic" was based on the proposed extension of its terms to all common carriers and not on the proposal to include a "subsidiary, affiliate, or controlling person" of a carrier. We believe, however, that a fair reading of the legislative history leads to the conclusion that the "drastic readjustment" feared by the Committee was that expected from the application sought here by the Government, at least as much as that feared from extension of the clause to cover carriers other than railroads. If the Committee ob-

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[7] *Id.*, at 427 (April 10, 1939).

[8] *Ibid.*

[9] Senate Report No. 433, 76th Cong., 1st Sess., 15 (May 16, legislative day May 8, 1939).

jected only to extending the clause to other carriers, it would have been a simple matter to delete the short series of words which would have accomplished that change, and still leave undisturbed the more complicated provision concerning subsidiaries and affiliates, since the text of each provision is wholly disconnected from the other.

In view of the foregoing, it seems clear that when, in discussing whether or not this revised clause would have "prevented the steel company, or somebody in that position, from operating their own railroad," the Committee Chairman said "I did not intend such a result," he expressed the view which prevailed in the Committee and in the Congress.

The Government now asks us to apply the unchanged language as if Congress had adopted the proposal which it rejected as "far too drastic." The considerations which led to the suggestion that the problem presented by the Government's position would require separate legislation and particular consideration seems to us to require that the problem be left to legislation rather than to the judicial process. And the pertinent portions of the legislative history which are set out at length in the margin [10] indicate clearly, we think, that this Senate Committee responsible for S. 2009, which became the Transportation Act of 1940, deliberately refused to recommend and the Con-

[10] The extent of the consideration which the Senate Interstate Commerce Committee gave to the proposed revision of the commodities clause, is indicated by the following excerpts from Hearings on S. 2009, held from April 3 to April 14, 1939:

In opening the hearing, Senator Wheeler, Chairman, stated that, with respect to the commodities clause, the purpose of the bill was "to make effective the intent of Congress in prohibiting railroads, or other carriers after January 1, 1941, from transporting products not utilized in the conduct of their transportation business but in which they have an interest, direct or indirect."

During the testimony of the General Counsel, Association of American Railroads, the following colloquies took place:

"Senator Reed. Judge, in section 12 there is some new lan-

gress refused to legislate into the law the change we are now asked to make by judicial decision.

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guage. I have marked it 'O. K.' here. That is to cover the decisions of the Supreme Court in the *E., J. & E.* case?

Mr. Fletcher. I will get to that in just a moment. There is new language in there. . . .

Mr. Fletcher. I come now to section 12, the commodities clause, about which I would like to say a word.

It was the thought of those who drew the bill, H. R. 4862, to undertake to put into statutory form the recommendation of the Committee of Six that they ought to extend the commodities clause, which now applies only to railroads, to water carriers and motor carriers as well.

Now I think the water carrier people will object to that. . . .

. . . I think some of the steel companies have water operations of that kind. I mention that as a change in the law suggested by the draftsmen who prepared the bill, reflecting the views of the Committee of Six.

The Chairman. Judge, somebody called me on the phone the other day . . . and asked me as to whether or not in my opinion this prevented the steel company, or somebody in that position, from operating their own railroad, where they have a small railroad they are operating. *I did not intend such a result.*" (Emphasis supplied.)

Mr. Fletcher. This bill has no relation to that. One of my associates suggests, Senator, that possibly this language which I was just about to mention and which was called to my attention a few minutes ago by Senator Reed, might possibly have that effect.

Senator Reed. *I would disagree with the chairman*, if I may be so bold. *I think the commodities clause would have that effect in the bill that we are currently discussing.*" (Emphasis supplied.)

Mr. Fletcher. When I said so promptly and perhaps rashly that I did not think it did, I did not have in mind this particular amendment, which I will now mention.

Senator Reed. *I am perfectly willing that it should have that effect.*

The Chairman. *Well, I doubt that it should.* For instance, a lumber company may own some railroad.

Senator Reed. You exempt that?

Mr. Fletcher. You exempt the lumber company?

The Chairman. Yes.

Mr. Fletcher. It might not be altogether lumber.

The Chairman. *I was speaking, for instance, of some steel com-*

We could, of course, refuse to follow the *Elgin* precedent, and apply a different and more drastic rule to

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pany or some other industrial company which might own a short railroad. (Emphasis supplied.)

Senator Reed. The United States Steel Co. owns the Union Railroad Co.

The Chairman. I do not know what the Union Railroad Co. is.

Senator Reed. It is a short road.

Mr. Fletcher. I think the E. J. & E. started all this shouting.

Senator Reed. In section 12, on page 44, beginning at line 22, it reads: "or produced by or under the authority of such carrier or any subsidiary, affiliate" . . . and this is the language . . . "or controlling person of such carrier."

Mr. Fletcher. That is new, you see.

Senator Reed. That is new. I am in accord with the chairman on that language.

Mr. Fletcher. I do not know, Mr. Chairman, but I do think it is a trifle unfortunate to try to accomplish so drastic a thing in a bill of this kind, the thought of which was to reproduce existing law.

The Chairman. *I am very doubtful about it. I am afraid that it will cause such a drastic readjustment.* (Emphasis supplied.)

Mr. Fletcher. The *E. J. & E. Co.* [case] . . .

The Chairman (interposing). I am not familiar with the *E. J. & E.* case.

Mr. Fletcher (continuing) . . . brought about this suggestion here. There the United States Steel Corporation does not own the E. J. & E. directly, but through the medium of the Illinois Steel Corporation, a subsidiary of the United States Steel Co. . . . and I may get that a little confused . . .

Senator Reed (interposing). You have.

Mr. Fletcher. My recollection is that the United States Steel Corporation owns a company—you might call it a holding company—which holding company owns both the E. J. & E. and the steel corporation.

It was contended by the Government that when the E. J. & E. transported freight for the Illinois Steel Corporation they were violating the commodities clause, because either directly or indirectly the railroad owned this traffic that was being transported but the Supreme Court of the United States held not, but where you had one company or person who owned both the railroad and the com-

Bethlehem than applies to its competitor. Congress, however, in making a rule for the future, can make one of impartial application to all like situations. Limitations that are traditional upon our powers do seem not to permit us to do so.

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mercial enterprises that produced the tonnage, the transportation by the railroad of that tonnage was not equivalent to the transportation by the railroad of tonnage which it owned.

Senator Reed. Judge, you remember that Justice Stone, Justice Brandeis, and Justice Cardozo dissented from that majority opinion of the Supreme Court in the *E. J. & E.* case.

Mr. Fletcher. That is right.

Senator Reed. And Justice Stone wrote the dissenting opinion.

Mr. Fletcher. Yes.

Senator Reed. I am inclined to think that the Supreme (sic) as presently constituted, would hold with what was the minority view.

Mr. Fletcher. I would not express any opinion on that.

Senator Reed. I speak frankly, being no lawyer myself.

Mr. Fletcher. Whether that is wise or unwise, I doubt if it ought to be done in this legislation and in this bill.

Senator Reed. I thought Justice Stone wrote a more logical opinion that Justice Butler did. I think it was Justice Butler who wrote the majority opinion in that *E. J. & E.* case.

Mr. Fletcher. I think it was." [Justice McReynolds wrote the opinion of the Court.]

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Later, during the testimony of Counsel for Mississippi River System Carriers' Association, the following statements concerning the commodities clause were made:

Senator Reed. ". . . . and I think we might give further consideration to that commodities clause."

Mr. Bayles. It is too drastic, also.

Senator Reed. It was probably tightened up when, which I say as a layman and therefore not in fear of being criticized, the Supreme Court of the United States made a strange decision in the *E. J. & E.* case. This was tightened to meet that E. J. & E. decision, because I think that was a strange construction of the law on the part of the Supreme Court of the United States.

Testimony by counsel for coal operators led to the following:

Whatever may be said of the *Elgin* decision, when the Committee of Congress faced the readjustments its overruling would force, and with special reference to the steel

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Senator White. What changes have been made in the commodities clause.

Mr. Norman. Very substantial ones.

The Chairman. Very substantial.

Mr. Norman. That is on page 44.

The Chairman. What we tried to do, to be frank with you, was to try to adapt it to meet the decision of the Supreme Court in the *E. J. & E.* case.

Senator Reed. I think, of course, what Mr. Norman has in mind is that it goes further than that, in that for the first time we are applying the commodities clause to water carriers.

Senator White. I understood that, but in what other respects?

Senator Reed. I think that is the only respect.

Mr. Norman. Well, no; as the Senator says, it probably would get around the Supreme Court decision in the *E. J. & E.* case, because it puts in there the words "subsidiary, affiliate, or controlling person of such carrier."

The Chairman. That is right."

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A discussion of the effect on coal-industry contract carriers followed. Then:

"Mr. Norman. So that commodities clause, again, is a big one, and certainly ought to be studied before there are any changes made in it. It is loaded with dynamite so far as business is concerned.

Senator Reed. You may have one kind in mind, but there are many of them.

The Chairman. There are difficulties on that question, in my mind. Suppose we reenacted the law as it is. The question is whether the courts might say, in view of the Supreme Court's decision, "In reenacting the law, you approved the decision of the Supreme Court."

On April 10, 1939, the Chairman, in addition to the statements quoted in the body of this opinion also said:

". . . I want to say that I think it is foolish for a lot of people to come in here and waste our time and their own time in talking about that [the commodities clause] and for that reason I wanted to make it clear by that statement . . .

"As I said before, this is such a broad subject and it would un-

industry,[11] it concluded the decision should be allowed, at least for the present, to stand. We cannot ignore the considerations they found to be so persuasive, and which are equally involved in the request that we do what Congress considered and abandoned.

The relief asked of us as a court of equity is so drastic in nature as to afford an example of an "upset" in an industry owning a short line of railroad of the type referred to by the Chairman of the Interstate Commerce Committee of the Senate, who said "it is questionable whether we would want to make such a radical departure from the present system." The demand is for an injunction perpetually to enjoin and restrain South Buffalo from transporting commodities in which the Steel Company or the holding company owns an interest. There is no other rail route by which inbound raw materials or outbound products of this huge industry can reach trunk-line railroads. And the traffic that we are asked thus to prohibit yields 70% of the railroad's revenues, and if taken away would doubtless substantially increase the cost of service to the unaffiliated industries that would remain to be served. Of course, what is literally asked is probably not

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doubtedly cause a tremendous upset in many lines of business, that it is questionable whether we would want to make such a radical departure from the present system."

As pointed out in the text, when the Bill was reported to the Senate, the proposed changes in the commodities clause had been abandoned. The Committee report stated:

". . . The commodities clause, forbidding a carrier by railroad to transport any article or commodity in which it has an interest direct or indirect, with certain exceptions not very material [timber and timber products] has been retained . . ."

". . . Section 12. Commodities Clause. This provision retains the 'commodities clause' (sec. 1 (8) of the Interstate Commerce Act), now applicable only to railroads, in its present form. The rewritten commodities clause was considered far too drastic and the subcommittee early decided against any change therein."

[11] See note 10.

what is ultimately desired. To forbid the physical operation as now conducted would be needlessly damaging to both shipper and carrier. What is aimed at, we suppose, is to force such a change of financial structure as will divorce shipper interest from all transportation interest. It seems clear, however, in the light of the legislative history, that this is the kind of operation that Congress did not want to prohibit because the prohibition was thought too drastic. If an independent ownership could be found for South Buffalo, it might be desirable. But independent ownership of a dependent facility wedged in between shippers, one of whom controls 70% of its revenues, and the trunk-line railroads, is not shown to be likely. Under the Government's theory, no other shipper or group of shippers any more than Bethlehem could own the road. Nor is it clear that any evils exist or are threatened which would be eliminated if this operation were transferred to control of one of the trunk-line railroads or to a pool of them. This road, despite its shipper ownership, is bound by both federal and state law to serve all shippers without discriminations or unreasonable charges. The Commission has power to exact compliance with these duties. The argument, however, is that a situation exists which presents opportunity and temptation for abuse and for concealed evasions of duty. But to forestall possible abuses we are asked to apply a remedy which there is indication failed of congressional approval because its application to many situations would be too drastic and would do greater injury to shipper and transportation interests than could result from its withholding. In the light of the history of this clause since the *Elgin* decision and the equitable considerations involved in this case, we decline to overrule the interpretation Congress has not seen fit to set aside.

The argument is made that even accepting the *Elgin* decision the evidence here establishes that Bethlehem has

so exercised its power over South Buffalo as to reduce the railroad to a mere department of Bethlehem. The trial court found against the Government and considered that on this subject this case contains much less proof to sustain an injunction than did the *Elgin Case*. Without reciting the voluminous evidence in detail, we agree. Bethlehem, as a stockholder, of course controlled South Buffalo. It did not, however, disregard in either the legal or economic sense, the separate entity of its subsidiary or treat it as its own *alter ego*. On the contrary, it rather ostentatiously maintained the formalities of separate existence, choosing as directors several Buffalo citizens who were not interested in Bethlehem. We are not naive enough to believe that Bethlehem chose men for the posts whose interests or records left any fair probability that they would act adversely to Bethlehem in representing its interest as chief stockholder of the railroad. Nor has any instance been cited in which the best interests of the railroad would require them to do so. So long as Congress considers it inadvisable to extend the prohibition of the commodities clause to subsidiaries and affiliates, we see nothing that Bethlehem has done to incur liability for its violation. Of course, it could not expect the Commission or the courts to respect a corporate entity which Bethlehem itself disregarded; but that it has not done. The subsidiary would not have to establish its separate identity by a course of hostility to its sole stockholder or its chief customer. Its identity has been preserved in form and in substance—the substance of separate corporate existence being itself largely a matter of form. Under the *Elgin Case* and until Congress shall otherwise decide, this is sufficient.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1947.

The United States of America, Appellant, v. South Buffalo Railway Company, Bethlehem Steel Company, and Bethlehem Steel Corporation.	Appeal From the District Court of the United States for the Western District of New York.

[April 26, 1948.]

Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy join, dissenting.

This is another case where the Court saddles Congress with the load of correcting its own emasculation of a statute, by drawing from Congress' failure explicitly to overrule it the unjustified inference that Congress approves the mistake. I think that *United States* v. *Elgin, Joliet and Eastern R. Co.*, 298 U. S. 492, was decided in the teeth of the commodities clause, 49 U. S. C. § 1 (8), that it should now be overruled, and that this conclusion is dictated by the legislative history which the Court misreads, in my opinion, as giving basis for the opposite one.

The commodities clause forbids "any railroad company to transport . . : any article or commodity . . . in which it may have any interest, direct or indirect . . . ." The *Elgin* decision made the clause "in which it may have any interest, direct or indirect" to read, in effect, "in which it may have any interest, direct or indirect, unless the interest is indirectly held through 100 per cent stock ownership of another corporation and hence 100 per cent interest in that company's profits, or through some other corporate arrangement having like effects."

The simple question for decision under the statute is whether the South Buffalo Railway has an interest, "direct or indirect," in the commodities which it hauls for the affiliated Bethlehem Steel Company. Any attempt to answer by a factual inquiry into the degree of control which the Holding Company or the Steel Company has actually exercised over the railroad can only complicate a simple problem.[1] Only by the most sophisticated, or unsophisticated, process of reasoning can it be concluded that any one of the many subsidiary members of this integrated steel producing empire[2] has no interest in the operations of every other member. Particularly, the railroad has an interest in the production of the Steel Company, "for all of the profits realized from the operations of the two must find their way ultimately into [the Holding Company] treasury,—any discriminating practice which would harm the general shipper[3] would profit the Holding Company." *United States* v. *Reading Co.*, 253 U. S. 26, 61. Here a railroad and one of its customers are both wholly owned subsidiaries of the same holding

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[1] See Comment, The Commodities Clause and the Regulation of Industrial Railroads, 46 Yale L. J. 299; 36 Col. L. Rev. 1175.

[2] The Holding Company owns substantially all the stock in approximately 57 subsidiaries, including the Steel Company and the South Buffalo Railway Company. Some of these produce ore in Chile, Venezuela, Cuba and in the Upper Great Lakes regions; others control coal mines in West Virginia and Pennsylvania. Two subsidiaries operate ocean-going steamship lines, hauling raw materials to steel plants controlled by other subsidiaries. A Great Lakes shipping company owned by the Holding Company carries ore from a mining subsidiary to a producing subsidiary. Seven short-line railroads including South Buffalo, each wholly owned by the Holding Company and having common officers and directors, transport products for the various Bethlehem steel plants.

[3] The opinion of the Court seems to assume that the purpose of the commodities clause was to prevent the holding company from favoring "its shipping subsidiary at the expense of its carrying subsidiary, or vice versa."

company. It is clear to me, and the Court does not deny, that the railroad in fact is occupying the inconsistent positions of carrier and shipper which the commodities clause was designed to prevent. *United States v. Reading Co., supra.*[4]

The Court does not dispute that it would so hold if the clause had not been construed differently in the *Elgin* case. But even on the assumption that the statute was then misconstrued, the Court is unwilling to correct its own error because it concludes that Congress has subsequently indicated approval of the *Elgin* decision. This conclusion is based on a distorted view of the legislative history of the Transportation Act of 1940, particularly of § 12 of S. 2009, which would have amended the commodities clause if adopted. Since the proposed § 12 would have overruled the *Elgin* case, and since it was rejected in committee as "far too drastic,"[5] it is inferred that Congress has expressed approval of that case.

The conclusion does not follow because the premise is wrong. The argument overlooks the crucial inquiry, namely, the reason for which Congress considered the proposed § 12 "far too drastic." If this reason had been an objection to applying the commodities clause to the wholly owned subsidiary relationships present in this and the *Elgin* cases, the argument might have some pertinence. But that was not the reason. On the contrary, the two Senators who were most active in sponsoring the bill and

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[4] Moreover, the conclusion is factually justified by the history of complete domination prior to 1940 plus the fact that former employees of the Steel Company continue to be the principal officers of South Buffalo as well as the other Bethlehem short-line railroads. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control." *North American Co. v. S. E. C.*, 327 U. S. 686, 693.

[5] Sen. Rep. No. 443, 76th Cong., 1st Sess. 15; Hearings before Senate Committee on Interstate Commerce on S. 2009, 76th Cong., 1st Sess. 427, 590, 772.

in the conduct of the hearings on it felt that no legislation would be necessary if no more were intended than a reversal of the *Elgin* case.[6] That was only one of several

[6] Senator Reed expressly so stated: "Judge, you remember that Justice Stone, Justice Brandeis, and Justice Cardozo dissented from that majority opinion of the Supreme Court in the *E. J. & E. case* . . . I am inclined to think that the Supreme [sic], as presently constituted, would hold with what was the minority view." Hearings before Senate Committee on S. 2009, 76th Cong., 1st Sess. 68. He later said that he thought the *Elgin* decision "was a strange construction of the law on the part of the Supreme Court of the United States." *Id.* at 309.

The views of Senator Wheeler seem clearly to the same effect. When it was first suggested that the proposed commodities clause would overrule the *Elgin* case, he stated (apparently because he was interested primarily in extending the clause to apply to other types of carriers): "I did not intend such a result." When the effect of the clause was pointed out to him, he expressed doubt whether that case should be overruled, not because he approved it, but as he explained because "I am not familiar with the E. J. & E. case." *Id.* 367–68.

Three days later, when the point was again under discussion, Senator Wheeler, at this time apparently refreshed in recollection of the *Elgin* case, frankly stated that one of the purposes of the revised clause was to meet the Supreme Court decision in it. The witness then expressed the view that the revised clause went considerably beyond the decision because it applied to other types of carriers, and to situations where the shipper owned only ten per cent of the carrier's stock. The witness suggested that, if the intent was merely to reverse the *Elgin* case, it would be better to leave the clause in its present form, because "I do not believe the decision in the *E. J. & E. case* is going to be one of the laws of the Medes and the Persians." *Id.* 385.

After more discussion of the effect of the amended version on water carriers and pipe lines, Senator Wheeler remarked: "There are difficulties on that question, in my mind. Suppose we reenacted the law as it is. The question is whether the courts might say, in view of the Supreme Court's decision, 'In reenacting the law, you approved the decision of the Supreme Court.'". *Id.* 386.

The Senator thus was faced with a dilemma. At this point he was apparently persuaded that the extension of the commodities clause to all carriers was a more drastic change than he had originally

broad purposes of the bill, others being much more sweeping. The new commodities clause, instead of applying only to railroads, would have applied to all types of carriers except air carriers. It is perfectly clear from a reading of the hearings that this proposed application to carriers of all types was what was considered "far too drastic" a change to be included in the Transportation Act of 1940.

The crucial importance of this extension is abundantly shown from the vigorous objections on behalf of parties that would have been affected by extending the commodities clause to water carriers,[7] to pipe lines,[8] and to motor carriers.[9] It was argued repeatedly that it was proper for shippers to control interests in these carriers for reasons not applicable to carriers by rail. These arguments cannot be read without concluding that the change, whether desirable or not, would have been drastic indeed and would have gone far beyond the intended coverage of the Transportation Act of 1940.[10] Rather

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realized, but hesitated to reenact the old version lest the reenactment be construed as legislative approval of the *Elgin* case. His fear has now been justified by today's decision. It was not until the following week that he reached the conclusion that the drastic nature of the proposed change outweighed the risk that reenactment would be construed as approval of that case. *Id.* 427; and see statements quoted in note 12 *infra*. Such a choice hardly can be construed into "approval" of the decision.

[7] *Id.* 236, 284–286, 308–310, 385–387, 427–432, 492, 623, 632–633, 692, 753–754, 926–928.

[8] *Id.* 386, 589–597, 606–610, 611–612, 654–660, 736–742.

[9] *Id.* 127, 432–433.

[10] For example, the petroleum industry strenuously opposed the provision because it would have effected the divorcement of pipe line companies from producers. See note 8 *supra*; cf. *id.* at 935. Opposition by farm lobbies was directed particularly at the new commodities clause: "Section 12 appears to endanger the activities of more than 100,000 farmers of our area who have cooperatively associated themselves together and who, because of exorbitant rail rates, are transporting increasing tonnage of grain, livestock, and

than jeopardize the entire legislative program comprehended by the Act,[11] the committee naturally decided that sound strategy required separate consideration of this narrower, but still broad and highly controversial problem.

Statements of the committee chairman show that this was the real basis for the conclusion that the amendment would have been "far too drastic." [12] Indeed they show, together with other statements before the committee, that the *Elgin* decision was regarded as unfortunate and likely to be overruled when another case should arise.[13] Even the opposition by the short-line railroads was based not

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petroleum products both through cooperative trucking associations and by trucks owned by local or regional cooperatives." *Id.* 432–433. See also *id.* 311. The most vigorous opposition, however, came from parties who would be adversely affected by the applicability of the clause to water carriers. See note 7 *supra.* They pointed out, as an instance of the far-reaching effect of the amendment, that 65 per cent of the privately owned American merchant marine would be affected by the change.

[11] See Hearings 772; cf. note 10 *supra.*

[12] Senator Wheeler explained the basis for the decision to abandon the proposed amendment more than once. To shorten testimony by witnesses interested in the effect of the clause on pipe lines and water carriers he stated: "You might as well quit wasting your time, because I made an announcement yesterday with reference to that, and I hope you people will not come here with the idea of taking up a lot of time on that. I have said that pipe lines are a subject that ought to be given independent consideration, and we cannot take it up and give it the necessary time and study in this bill. That may be modified or eliminated, so far as pipe lines and water carriers are concerned." *Id.* 590. Later he said: "I have felt, frankly, that in this particular legislation, which does divorce, ships from industry, that it was such a broad subject, and one which required so much independent study, that it ought to be handled by separate legislation. No one in the Government service seems to have made a study of the question. I felt that it ought to be eliminated from the provisions of this bill at this time, and be introduced as separate, independent legislation, as has been done in the past." *Id.* 772.

[13] See note 6.

on the argument that an overruling of the *Elgin* case would have been too drastic, but rather on the fact that the amended § 12, in conjunction with other proposed legislation, would have prohibited the transportation of commodities for anyone who owned, even as an investment, as much as ten per cent of the stock of the railroad.[14] And other groups argued that the amendment was too drastic because it was not limited to common carriers.[15] In sum, the proposed amendment was indeed drastic, but not because it would have accomplished what the committee members assumed this Court would and should do without legislative aid.[16] It is therefore most unreasonable to conclude that the considerations which prompted the Senate Committee to reject a proposed extension of the commodities clause to all types of carrier compel this Court to deny a request to overrule an interpretation of the impact of the clause on railroads which the most active sponsors regarded as erroneous.

The host of reasons which may have induced the various members of the committee to forego the extremely controversial and drastic extensions forbids any inference that the committee action was the equivalent of approval of the *Elgin* case by the entire Congress. In fact, the difficulty of interpreting the views of even one legislator without taking account of all he has had to say, as exemplified by the discussion in note 6, should serve as a warning that the will of Congress seldom is to be determined from its wholly negative actions subsequent to the enactment of the statute construed. In this case the rejection of the proposed amendment is not more, indeed I think it is less, indicative of congressional acquiescence than complete inactivity would have been. Even if there may be cases where the "silence of Congress" may

[14] Hearings 541; and see *id.* 285, 385–386.

[15] *Id.* 421, 435, 841.

[16] See note 6.

have some weight, that ambiguous doctrine does not require or support the result which the Court reaches today. *Girouard* v. *United States*, 328 U. S. 61; cf. *Cleveland* v. *United States*, 329 U. S. 14, concurring opinion at 21.

Nor is that result justified by the "equitable" considerations which the Court's opinion somewhat obliquely advances. It is suggested that a refusal to follow the *Elgin* precedent would be to apply a different and more drastic rule to Bethlehem than applies to its competitor, the United States Steel Corporation. But, aside from the specious character of an argument that permits X to violate the law on the ground that Y also violates it, there is no explanation offered for the assumption that the overruling of the *Elgin* case would have no effect on United States Steel. The policy of *res judicata* would not apply, cf. *Commissioner* v. *Sunnen*, 333 U. S. —, and United States Steel, instead of being prejudiced by the course of decision, actually has been benefited by more than a decade of ownership of the Elgin road, contrary to the statute's plain terms and policy.

The Court also feels that the relief requested is too drastic because Bethlehem would be compelled to sell its short-line railroads, the Government has not shown that independent ownership of these railroads is likely, nor has it shown that evils exist which would be remedied by this relief. These are considerations which undoubtedly influenced the majority in the *Elgin* case, somewhat differently it would seem from the majority in this one, but which the dissenting justices felt had been foreclosed by the legislative determination of policy. Reliance on such arguments today seems inconsistent with the statement "that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved." Moreover, it does not follow that this Court in the exercise of its equity jurisdiction could not adapt the relief afforded so as to give time and opportunity for making

the adjustments necessary to secure conformity with the statute in an orderly and inoppressive manner. Indeed it would be the Court's duty to do this.

The arguments on this level are most effectively answered by the dissenting opinion of Mr. Justice Stone, who was joined by Mr. Justice Brandeis and Mr. Justice Cardozo, in the *Elgin* case: "The language of the commodities clause, read in the light of its legislative history, can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier, which experience had shown are likely to occur when a single business interest occupies the inconsistent position of carrier and shipper. See *United States* v. *Reading Co.*, 253 U. S. 26, 60, 61. Before the enactment of the commodities clause, Congress, by sweeping prohibitions, had made unlawful every form of rebate to shippers and every form of discrimination in carrier rates, service and facilities, injurious to shippers or the public. By the Sherman Act it had forbidden combinations in restraint of interstate commerce. But it did not stop there. The commodities clause was aimed, not at the practices of railroads already penalized, but at the suppression of the power and the favorable opportunity, inseparable from actual control of both shipper and carrier by the same interest, to engage in practices already forbidden and others inimical to the performance of carrier duties to the public. See *Delaware, L. & W. R. Co.* v. *United States*, 231 U. S. 363, 370; *United States* v. *Reading Co.*, *supra*." 298 U. S. at 504.[17]

In my opinion this expresses the intent of the letter and the policy of the commodities clause, and we should now return to it on our own responsibility. Congress should not again be required to reenact what it has once provided for, only to have its mandate nullified in part by this Court's misconstruction.

[17] See also note 4.